

OFFICIAL OPINIONS

(The opinions in this volume have been considered in conference by the members of this department, approved, certified by the Attorney General, and recorded in the permanent records of this office.)

OPINIONS RELATING TO BANKS AND BANKING

Op. No. 2873

BANKING COMMISSIONER—TRUSTEE—ACTS FORTY-SECOND
LEGISLATURE, CHAPTER 165.

Under Acts of the Forty-second Legislature, Regular Session, Chapter 165, page 280, the Banking Commissioner is vested with discretion in approving a trustee and may require a trustee to be domiciled in the State of Texas.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, October 27, 1931.

Hon James Shaw, Banking Commissioner, Capitol, Austin, Texas.

DEAR SIR: This will acknowledge receipt of your favor to this department, under date of October 9, 1931, wherein your request and opinion concerning certain features of Senate Bill No. 165, passed at the Regular Session of the Forty-second Legislature, the pertinent part of your letter with reference to this matter reading as follows:

"I refer you to Senate Bill 165, Section 7 thereof. Said section provides in part that before selling or offering for sale on the installment plan in Texas any such bonds, notes, certificates, debentures, etc., such corporation shall file with the Banking Commissioner specimen copy of such bonds. It further provides that the securities securing said bond shall be placed in the hands of a corporation having trust powers as trustees approved by the Banking Commissioner of Texas under trust agreement, **THE TERMS OF WHICH SHALL BE APPROVED IN WRITING BY THE BANKING COMMISSIONER OF TEXAS.** The Commissioner has refused to approve the terms of these trust agreements unless the trustee is located within the State of Texas.

"Will you please be good enough to advise this Department if it is within the power of the Banking Commissioner to disapprove forms of bonds and trust agreements on the ground that the corporation issuing same does not have its trustee located within the State of Texas."

The particular portion of the above act, pertaining to your inquiry, appears to us to be fully set forth in Section 7 thereof, the material part of which being as follows:

"All bonds, notes, certificates, debentures, or other obligations sold in Texas by any corporation affected by a provision of this Act shall be secured by securities of the reasonable market value, equalling at least at all times the face value of such bonds, notes, certificates, debentures or other obligations. If such corporation sells in Texas bonds, notes, certificates, debentures or other obligations upon which it receives installment payments, such bonds, notes, certificates, debentures and other obligations shall be secured at all times by securities having the reasonable market value equal to the withdrawal or cancellation value of such obligations outstanding. Said securities shall be placed in the hands of a corporation having trust powers approved by the Banking Commissioner of Texas as trustee under a trust agreement, the terms of which shall be approved in writing by the Banking Commissioner of Texas. Provided, that before selling or offering for sale on the installment plan in Texas any such bonds, notes, certificates, debentures, or other obligations, such corporation shall file with the Banking Commissioner specimen copies of such bonds, notes, certificates, debentures or other obligations."

It will be noted from this particular section of the act that no corporation is required to secure such obligations by securities except as to such obligations as are sold in Texas. The act does not attempt to protect or secure any person outside of Texas who has purchased such obligations from a Texas corporation. Therefore, it appears to us that this entire act is in the nature of a blue sky law to protect purchasers of securities residing in Texas. The power to pass such a law under the police power of the State with reference to such matters, and especially with reference to protecting citizens of Texas who purchase such obligations as to the ones here in question, is well settled.

Phillips vs. Perue, 111 Texas, page 112; Pierce Oil Corporation vs. Weinert, Secretary of State, 106 Texas, 435; Blake vs. McClung, 172 U. S., 239.

In the case of Phillips vs. Perue, supra, the court had under consideration certain statutes of the State of Texas creating a trust fund for the benefit of persons residing in Texas who had obligations against a bonding company doing business within the State. It was contended by the liquidator of a certain foreign corporation, which had become insolvent, that the Texas obligations did not take priority over other holders of such obligations. In construing these statutes and in disposing of this contention, Mr. Chief Justice Phillips used the following language:

"The only reasonable inference to be drawn from these articles of the statute is that the legislature intended the deposit of such a company to constitute a special trust fund for the protection of its policy obligations issued in the transaction of its business within the State. The rights of the holders of such obligations to the fund would, therefore, in our opinion, be superior to any right of the liquidator of the company under the New York laws."

From reading this particular section of the statute, as well as the entire statute, one cannot escape the conclusion that the Legislature intended by the terms of this act to fully protect persons residing within this State with reference to the purchase of such obligations or securities, to the exclusion of all others. The act does not in specific terms specify that a Texas trustee must be appointed, nor does it specifically set forth that a corporation whose domicile is without the State may be appointed. We think, however, from the terms of this act, the Banking Commissioner is vested with discretion with reference to such a designation. The particular portion of this act with reference to this question reads as follows:

"Said securities shall be placed in the hands of a corporation having trust powers, *approved by the Banking Commissioner of Texas, as trustee under a trust agreement the terms of which shall be approved by the Banking Commissioner of Texas.*"

We think that the legislature intended to vest in the Banking Commissioner the power to use his best judgment and discretion in the approval of a corporation having trust powers to act as trustee in such matters as provided by this act. We do not think that the legislature exceeded its authority in placing such power in the Banking Commissioner because the same seems to be reasonable and not arbi-

trary and of necessity must be vested in some public official charged with the duty of approving same. See in this connection the following authorities:

Hall vs. Geiger-Jones Co., 242 U. S. 539.
 Red Oil Manufacturing Co. vs. North Carolina, 222 U. S. 380.
 Mutual Film Corp. vs. Industrial Comm. of Ohio, 236 U. S. 230.
 Brazee vs. Michigan, 241 U. S. 340.
 Gundling vs. Chicago, 177 U. S. 183.

Assuming, as we do, the power of the legislature to vest in the Banking Commissioner the power to use his judgment and discretion in the approving of such corporation having trust powers to act as trustees, under the terms of this act, the question then naturally arises, if the Banking Commissioner deems it most advisable to have a corporation having trust powers to act as trustee, domiciled in Texas or having its place of business or office in Texas, to the exclusion of a foreign corporation having trust powers and domiciled in a foreign state, would such action on his part be an arbitrary abuse of such discretion

As heretofore stated, it appears to us from reading the entire act that it was passed primarily and exclusively for the purpose of protecting the purchasers of such securities who reside in Texas. Therefore, it appears to us that it would be expedient, in order to carry out the terms of this act, to require that a corporation acting as such trustee be domiciled in Texas, or have such trustee in Texas, for reasons which are obvious to anyone. In accordance with this view, we think that the Banking Commissioner has discretion under this act, if he deems it most advisable and expedient, to require such trustee to be domiciled in the State of Texas, and you are accordingly advised.

Yours very truly,

SIDNEY BENBOW,
 Assistant Attorney General.

This opinion has been considered in conference, approved, and is now ordered filed.

JAMES V. ALLRED,
 Attorney General of Texas.

No. 2883

BANKS—BANKING

1. Generally, preferences, as respects to banks in liquidation, should be discouraged except where right thereto clearly appears.
2. Proceeds of a loan on adjusted compensation certificate deposited in special account held exempt from seizure by Banking Commissioner, and is a preferred claim.

OFFICES OF THE ATTORNEY GENERAL,
 AUSTIN, TEXAS, June 13, 1932.

Honorable W. C. Torrence, State Service Officer, Land Office Building, Austin, Texas.

DEAR SIR: Your recent letter addressed to this Department has been received. We quote from your letter as follows:

"Where a World War Veteran procures a loan on his adjusted service certificate and deposits the proceeds of such loan in a bank in a special account, and the bank has knowledge of the nature of such deposit, and afterward the affairs of the bank are taken over by the Banking Commissioner for liquidation, is such deposit a preferred claim?"

It is the well settled law of this State that in the absence of a statute or some agreement to the contrary, money received by a bank on general deposit becomes the property of the bank, and its relation to the depositor is that of debtor. *Hall vs. Tyler Co.*, 247 S. W. 582; *Kidder vs. Hall*, 251 S. W. 497, 113 Tex. 49.

Section 618, Part III, Chapter 11, Title 38, of the United States Code (30 U. S. C. A. 618), provides:

"No sum payable under this chapter to a veteran or his dependents, or to his estate, or to any beneficiary named under Part V of this chapter, nor adjusted service certificate, and no proceeds of any loan made on such certificate, shall be subject to attachment, levy, or seizure under any legal or equitable process, or to National or State taxation, and no deductions on account of any indebtedness of the veteran to the United States shall be made from the adjusted service credit or from any amounts due under this chapter."

There are a few general principles that we deem it well to bear in mind in considering the question submitted.

(1) The statutes of the United States providing for benefits or relief to World War Veterans are to be construed liberally.

Section 618, U. S. C. A., is a part of a general act providing for relief to World War Veterans and their dependents, and is in the nature of a beneficence, which the government can give, endowed with all privileges and attributes that it desires to attach thereto.

Generally, statutes serving such beneficial purposes are to be liberally construed. *O'Dea vs. Cook*, 169 Pac. 366; *U. S. vs. Law*, 299 Fed. 61.

That Section quoted also provides for certain exemptions, and with the exception of exemption from taxation "the tendency of the courts is to construe exemption statutes as applicable to any process or proceeding, by which it is sought to subject the property, if the statute does not by its terms clearly exclude such a construction." 25 Corpus Juris, 126; *Kinard Administrator vs. Moore*, 3 S. C. Law Rep. 193.

(2) The intent of Congress in enacting the statute is shown to provide for the protection of such funds.

Congress went much further than it had in other exemption statutes with reference to pension and veterans' relief measures, and used the phraseology "proceeds" instead of "amount payable", or "due or to become due", and went even still further and exempted such proceeds from any set-offs or claims by the United States Government itself. It seems clear that the primary object of this portion of the statute is not merely to protect the funds or proceeds from seizure by means of process technically known as "attachment and levy", and like process, but to preserve the funds for the benefit of the veteran and his family against any appropriation or seizure by process of law or equity. In Texas the Banking Commissioner is

authorized to take over an insolvent bank without the necessity of court action, and is it not reasonable to conclude that Congress intended in the use of the words "any * * * equitable process" to embrace just such a proceeding as is set out in your letter.

The case of *Ramisch vs. Fulton*, 180 N. E. 735, is directly in point. In this case the Court said:

"The word 'seizure' signifies a taking by force: 'The act of taking possession by virtue of an execution or legal authority. * * * As respects the fact of seizure it matters not by what legal officer, * * * Whether done by the one or by the other, the act of each, the seizure itself, the forcibly taking possession, is precisely the same in both cases.

"'Proceeds' has been defined as being the amount preceeding or accruing from some possession or transaction', and it is clear to us that this term was used in the section of the U. S. Code above quoted in the usual and generally accepted sense. When control of a bank for liquidation purposes is taken by the superintendent of banks, the question of preference creates in reality a controversy between the depositor claiming a preference and the other depositors who are general creditors, inasmuch as the assets in which all are to participate are diminished to the extent of whatever preferences are allowed. The creation of preferences, generally speaking, should therefore be discouraged except in cases where the right thereto is clearly established.

"In the instant case the bank must be held to have known that the check deposited by Ramisch represented the proceeds of a loan made to him by the government, and that when collected the amount thereof was in fact the proceeds of the loan. The bank and every one connected or dealing therewith was also bound to know the law and to know that the proceeds of any such loan were exempt from seizure under legal or equitable process.

"The amount of these proceeds remained intact, no part thereof having been appropriated by Ramisch to any other purpose nor converted by him into any other form of property. The commercial account was opened by him for the sole purpose of depositing therein this government check, and no interest was payable thereon. In no sense was it an investment, nor a transaction from which any profit would accrue. The assets of the bank were augmented to the extent of the \$785, so deposited, and this sum being proceeds of a loan exempt from seizure under legal process, of which the bank and the other creditors were bound to know, none of the creditors can be heard to complain thereof."

It is our opinion, and you are, therefore, advised, that the proceeds of a loan made upon an adjusted service certificate of a World War Veteran deposited in a bank in a special account, where the bank knows of the character of the funds, or is chargeable with notice thereof, is exempt from "seizure" by the Banking Commissioner and is a preferred claim.

Very truly yours,
(Sgd.) WALTER A. KOONS,
Assistant Attorney General.

OPINIONS RELATING TO CORPORATIONS

Op. No. 2845

**BUILDING AND LOAN ASSOCIATIONS—SECTION 45, CHAPTER 61, ACTS OF
THE FORTY-FIRST LEGISLATURE, SECOND CALLED SESSION
CONSTRUED.**

1. Under Section 45 of said Acts, a building and loan association which, in lieu of charging a membership, cancellation or withdrawal fee of not to exceed two dollars per one hundred dollar membership fee has elected to charge a monthly service charge of not to exceed five cents per one hundred dollars, cannot now sell stock on the premium plan, or without any premium, and continue to collect the monthly service charge of five cents per one hundred dollars.

2. Such building and loan associations may, by amending their by-laws to provide that no monthly service charge shall hereafter be collected from any stockholder and that all stock hereafter sold shall be sold on a stated premium basis, after the adoption of such by-law, lawfully issue stock on the basis so adopted.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, April 15, 1931.

*Honorable James A. Shaw, Banking Commissioner of Texas, Austin,
Texas.*

DEAR SIR: We are in receipt of your letter dated March 23, 1931, requesting a conference opinion of this department as to the construction of Section 45, Chapter 61, Acts of the Forty-first Legislature, Second Called Session. The pertinent portion of this section reads as follows:

“Membership Fee. No association authorized to do business in this state is authorized to charge in excess of two per cent of the par or maturity value of each \$100.00 share of stock issued as a membership fee, a cancellation fee or a withdrawal fee, and provided that this limitation of charge shall apply to any fee or premium by whatsoever name called or designated, provided, however, the stipulated monthly payment upon any investment share upon which a membership or withdrawal fee may be charged shall not be less than 50 cents per \$100.00 share; and provided further that any domestic building and loan association in business on January 1, 1929, which does not solicit stock subscriptions in a territory other than the county of the home office or at a distance greater than fifty miles from the town or city of its home office may charge, in lieu of the \$2.00 per \$100.00 membership fee, (but not in addition thereto), a monthly service charge of not to exceed 5c per \$100.00, providing said association is at the time of the passage of this Act making such charge, and provided further, that such association if making such charge shall be limited in its expense disbursement for general operating purposes to such monthly expense receipts and shall not use interest profits for expense purposes.”

The inquiries which you make are:

I. Can an association, if operating under the service charge plan since January 1, 1929, sell stock on the premium plan, or without any premium, continuing to collect the service charge on the stock heretofore sold?

II. Is it possible for an association, operating under the service charge

plan on January 1, 1929 and continuing to do so since that time, to abandon that plan and to hereafter sell stock on the premium plan, or without any premium.

I.

We answer the first inquiry in the negative. It will be noted that the statute under which these associations have continued to collect a service charge provides, in part, as follows:

“ . . . that such association, if making such charge, shall be limited in its expense disbursement for general operating purposes to such monthly expense receipts and shall not use interest profits for expense purposes.”

The effect of this provision of the statutes is that every stockholder has a contract with the association of which he is a member that its expense disbursements for general operating purposes should be paid out of the monthly receipts from the service charge made and from no other source. The consequence is, if an association, which has been operating on the service charge plan, should undertake to abandon that plan and to issue stock under the premium plan, that the owners of stock purchased under the service charge plan would be paying the entire operating expenses of the association and the owners of stock issued in the future would not bear any portion of such operating expense. This would, of necessity, make a contract for the owner of stock purchased on the service charge plan much more onerous than that which he entered into. This cannot be legally done.

“The contract between a stockholder and a building and loan association has the same force as that of stockholders in other corporations; it consists of the certificate of stock, together with the charter and by-laws of the association, and the statute under which it was incorporated. . . .” 9 Corpus Juris, page 936.

The following is quoted from Fletcher, *Cyclopedia of Corporations*, Volume 1, page 1076:

“A by-law cannot impose upon a member or a stockholder who does not consent thereto any liability or restriction in addition to that which he has assumed, or to which he is subject by his contract of membership. Thus, in the absence of a charter or a valid statutory provision therefor or an express agreement, a by-law cannot render a dissenting member or stockholder liable to assessment by the corporation beyond the amount which he is required to pay by the contract of his membership.”

See also 4 R. C. L., page 364.

By-laws cannot be made to have a retroactive effect as against rights existing under subsisting contracts. 269 American Decisions, note; 9 Corpus Juris, page 926, notes 41 and 42.

Applying the above general rules to the facts under consideration, we see that stockholders of associations operating under the service charge plan, as provided in Section 45, have purchased said stock subject to a contract between themselves, the association and other stockholders that all stockholders should contribute to pay the general operating expenses of the association by submitting every month to a service charge assessment of not more than five cents per one hundred dollar share. It was further contracted, by virtue of the proviso contained in the law, that if the service charge plan was fol-

lowed, that the association should be limited in its expense disbursements for general operating purposes to the receipts from the monthly service charge. The effect of this proviso is that if an association collects a monthly service charge on stock, it cannot legally use funds from any other source for operating expenses. It was no part of the contract entered into by a purchaser of stock under the service charge plan for himself and those in like situation to pay all the operating expenses of the association while other stockholders escaped entirely the burden of such expenses, yet this would be the effect if an association, which has been operating under the service charge plan, should continue to do so as to stock already sold and undertake to sell stock in the future on the premium plan, or without any premium. For even if a premium were collected, no part of same could legally be utilized to pay any portion of the operating expenses of the association. We say, therefore, in answer to your first inquiry, that the contract entered into between a stockholder and a corporation is a vested right which the association cannot impair by a by-law having a retroactive effect and that the association cannot legally make the contract which the shareholder has entered into more onerous by adopting a system, the effect of which would make such prior shareholder and those in his situation charged with the burden of paying all of the operating expenses of the association.

II.

As to whether an association, which has heretofore been operating under the service charge plan, may abandon said plan and hereafter sell stock on the premium plan, or without any premium, we advise you as follows:

Assuming that no contractual or other legal rights of the present stockholders are concerned or are affected, we do not see any reason why an association cannot legally amend its by-laws to provide that its stock shall be issued on the premium plan, as provided in Section 45. To avoid effecting the contractual rights of the present stockholders, however, it is our opinion that it would be necessary to amend the by-laws of the association, at the same time, relinquishing to the owners of stock heretofore purchased on the service charge plan any right of the association to collect any such service charge in the future. The reason for this is, as heretofore pointed out, if a service charge is collected, the association *must* look to the receipts of the service charge account, and to no other funds, for general operating expenses of the association. It is our opinion, however, that if the service charge plan is abandoned by the association by a proper amendment of the by-laws, that no contractual rights of the present stockholders would be violated and they would not be heard to complain, since they then would not be the victims of discriminations or a greater burden than they undertook to assume under the contract which they entered into by the purchase of stock.

Yours very truly,

MAURICE CHEEK,
Assistant Attorney General.

Op. No. 2851.

BUILDING AND LOAN ASSOCIATIONS—VOLUNTARY LIQUIDATION

1. An affirmative vote of two-thirds of the voting shares in force is necessary to effect a voluntary liquidation of a building and loan association of this State.

2. Section 56, Chapter 61, Acts of the Forty-first Legislature, Second Called Session, construed.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, May 12, 1931.

Honorable James Shaw, Commissioner of Banking, Capitol.

DEAR SIR: Your letter dated May 9, 1931, requesting a conference opinion as to the construction of Section 56 of the present building and loan law, has been received. The present laws relating to building and loan associations are contained in the Acts of the Forty-first Legislature, Second Called Session, Chapter 61, page 100.

The inquiry which you make with reference to Section 56 is as follows:

“Does it require an affirmative vote of two-thirds of the voting shares in force to effect a voluntary liquidation or does it mean that a majority vote of stockholders owning two-thirds of the voting shares in force can effect a voluntary liquidation.”

The pertinent portion of Section 56 reads as follows:

“At the annual meeting or at any meeting called for that purpose, any building and loan association of this State may, by a vote of shareholders owning two-thirds of the voting shares in force, resolve to liquidate and dissolve the association; . . .”

This section has previously been construed as to another point in an opinion by W. Dewey Lawrence, Assistant Attorney General, in which this section was construed to apply to all building and loan associations organized in this State, whether solvent or insolvent. See Biennial Report of Attorney General of Texas, 1928 to 1930, page 316. This opinion, however, does not discuss the question which you propound; nor is there any case which we have been able to find which directly construes this section of the act.

Fortunately, however, we are not without authority in making the construction which you request. The provision of the National Banking Act relating to the voluntary dissolution of any national banking association, uses practically the same language as Section 56 of the building and loan law. Section 181, Title 12, Chapter 2, United States Annotated, reads as follows:

“Any association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock. (R. S., Section 5220).”

This section has been construed to require that the owners of two-thirds of the shares of stock of the banking corporations must vote *affirmatively* to force a voluntary liquidation and dissolution under this provision. In the case of *Green vs. Bennett*, (Tex. Civil Appeals), 110 S. W., 108, the Court used the following language in construing that portion of the National Banking Act just quoted:

"It seems to have been intended that, whenever the owners of two-thirds of the shares *should agree* that they do not desire to continue the business they may, under the forms prescribed, terminate the existence of the bank, and wind up its affairs." (Underlining ours.)

In the case of *George vs. Wallace*, 135 Federal, 286, affirmed *Wyman vs. Wallace*, 26 Supreme Court, 295, 201 U. S. 230, 50 L. Ed., 738, it appeared an attack was made on the dissolution of a national banking association which had two thousand shares of stock outstanding. We quote the following from this case, relative to the proceedings for dissolution:

"Pursuant to this resolution, another meeting of the shareholders was held February 25, 1896, 1696 shares being represented, at which a former resolution for liquidation in accordance with Section 5220 and 5221 of the Revised Statutes was adopted by a vote of those owning 1639 $\frac{3}{4}$ shares, *being some three hundred more than were necessary under the law.*" (Underlining ours.)

The language underlined indicates that the Court construed the act to require that two-thirds of two thousand shares of stock should be voted affirmatively for dissolution, since two-thirds of two thousand shares is one thousand three hundred and thirty-three and one-third shares; and the number of shares voted in favor of dissolution was just a little bit more than three hundred shares more than the minimum of the two-thirds required to force a voluntary dissolution. In the opinion by the Supreme Court on the appeal of this case, cited *supra*, it is pointed out that more than two-thirds of the stock voted for a voluntary liquidation, and the Comptroller of the Currency formally approved the liquidation, incidentally recognizing the requirement that the owners of two-thirds of the stock outstanding must vote in favor of going into liquidation before a voluntary dissolution may be forced by virtue of this law.

There are no cases which we have been able to find which construe the above section of the National Banking Act except in accordance with the views expressed by the cases cited. The construction placed upon that section is highly persuasive, since the language is practically identical with the language of Section 56 of the building and loan law first quoted. In fact, in the absence of any authority, we would feel impelled to construe the law to require that to force a voluntary liquidation of a building and loan association of this State, it is necessary that shareholders owning two-thirds of the voting shares in force must vote in favor of the liquidation.

We, therefore, advise you that it is our opinion that an affirmative vote of two-thirds of the voting shares in force is necessary to effect a voluntary liquidation of a building and loan association of this State.

Respectfully submitted,

MAURICE CHEEK,
Assistant Attorney General.

Op. No. 2868

CORPORATIONS—IMPLIED POWERS

Article 1302, Subdivision 50, R. C. S., Construed.

A holding company with a permit to do business in Texas, under Subdivision 50 of Article 1302, Revised Civil Statutes of 1925, does not have the right to enter into a contract with an insurance company, part of whose stock it owns, to organize with the funds of the holding company general agency territories for the sale of insurance policies by the insurance company, such contracts not being within the implied powers of the holding company.

It cannot, therefore, borrow money for such a purpose.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, August, 5, 1931.

Honorable J. E. Roberts, Deputy Commissioner of Banking, Austin, Texas.

DEAR SIR: Your letter, dated July 21st, 1931, addressed to the Attorney General, with reference to the right of National Founders, Inc., to sell units, as hereinafter described, has been referred to the writer for attention.

You state that this company is a Delaware Corporation, which has a permit to do business in Texas, under the provisions of Subdivision 50 of Article 1302, Revised Civil Statutes. Attached to your letter are the following:

(1) A copy of an agreement by and between National Founders, Inc., and American Hospital Assurance Company, a Texas corporation, by virtue of which National Founders, Inc., grants to American the exclusive right and privilege to use certain actuarial data, rate certificates, etc., owned by National, and to sell Dr. J. P. Reid's "timely policies" the copyrights to which are also owned by National Founders, Inc., in all general agency territories now, heretofore or hereafter created within the United States.

In consideration for the foregoing American Hospital Assurance Company agrees to pay to National Founders, Inc., the sum of Ten Thousand (\$10,000.00) Dollars for each general agency territory created, and, in addition thereto, a royalty of \$2.00 per thousand dollars, principal amount of major operation policies and \$1.00 per thousand dollars principal amount of child birth policies sold by it. National Founders, Inc., agrees to organize and create not less than six and not more than twelve general agency territories, each territory to include such states as shall be determined by it. It is recited that in order to finance the general agency territories respectively, National purposes to sell unit agreements for each territory.

There are other provisions of this contract which it is not necessary to state.

(2) A unit holder's agreement entered into between the purchaser of such unit and National Founders, Inc., in which the corporation for the purpose of organizing and financing the sale of Dr. J. P. Reid's policies of insurance for child births and operations in hospitals, for and in consideration of the payment of the sum of

\$3,500.00, of which \$500.00 is paid in cash and the balance is evidenced by a promissory note in the sum of \$3,000.00, agrees to pay to the said unit holder his proportionate share of \$2.00 per thousand dollars for the sale of all major operation timely policies and a proportionate share of \$1.00 per thousand dollars for sale of all child birth timely policies, said policies to be sold only in a certain stipulated group of states.

This is not a complete statement of all the provisions of this agreement, but it is sufficient for the purposes of this discussion

(3) Attached also is a contract entered into by and between the two corporations just mentioned and Guardian Trust Company of Houston, Texas, in which it is provided that the royalties payable to the unit holders shall be paid by American to the Trust Company for payment to the unit holders in the proportions mentioned. This trust is revocable by will by National Founders, Inc.

You request our opinion as to whether National Founders, Inc., has the right under its Texas permit to raise funds and conduct the character of business evidenced by the unit holder's agreement and contracts above described.

Subdivision 50 of Article 1302, Revised Civil Statutes, under which this corporation secured its Texas permit, authorizes it:

"To subscribe for, purchase, invest in, hold, own, assign, pledge and otherwise deal in and dispose of shares of capital stock, bonds, mortgages, debentures, notes and other securities, obligations, contracts, and evidences of indebtedness of foreign or domestic corporations not competing with each other in the same line of business; provided the powers and authority herein conferred shall in no way affect any provision of the anti-trust laws of this state."

It is pertinent here to state that the facts reveal that the National Founders, Inc., is the owner of fifty-one per cent of the stock of American Hospital Assurance Company, and the former company claims the right to sell these units for the purpose of raising funds to establish general agency territories for the sale of the policies of the assurance company as a power impliedly granted to it by virtue of its statutory right to invest in, hold and own capital shares of stock of foreign or domestic corporation. In other words, it is the contention of National Founders, Inc., that since the sale of these policies will bring revenue in the form of dividends by virtue of its status as a stockholder in the assurance company, that it has the power under its Texas permit to perform the kinds of service mentioned in the contracts described and also has the power to borrow money for such purposes.

It is our opinion that the position of National Founders, Inc., is not well taken. It is, perhaps, well to state at this point that while corporations in Texas do have the right to borrow money on the credit of the corporation and to that end may execute bonds or promissory notes therefor and may pledge the property and income of the corporation, that the money must be borrowed for the purpose of carrying on the legitimate and authorized business of the corporation; if it is borrowed for any other purpose, the act is ultra vires. Article 1321

and Galveston-Houston Interurban Land Company vs. Bow, 193 S. W. 353.

It is clear that the sale of the unit agreements by National Founders, Inc., does create the relation of debtor and creditor between the corporation and the unit holder. This is evidenced both by the language of the unit agreement and the provisions of the contracts mentioned. National Founders, Inc., in reality proposed to borrow money by the sale of these unit agreements, and the right of the unit holder to receive the royalties mentioned, is, in its final analysis, the obligation of National Founders, Inc., this obligation is not any the less real because the trust company is interposed between National Founders, Inc., and the payment of the royalties to the unit holder.

Holding as we do that National Founders, Inc., is borrowing money by virtue of its sale of unit agreements, its rights to sell same must be determined by a consideration of whether or not the money is to be used in furtherance of the authorized or necessarily implied powers of the corporation. As stated, the facts reveal that the funds raised in this manner are to be utilized to establish general agency territories and to promote the sale of the two types of insurance policies mentioned, sold by American Hospital Assurance Company.

It is our opinion that no holding company, organized or holding a permit under the provisions of Subdivision 50 of Article 1302, Revised Civil Statutes, has the right to enter into a promotion project, in the course of which it organizes, with its own funds, agency territories for the sole and only purpose of promoting the sale of products sold by any corporation whose stock it happens to own. Such an undertaking is, we think, an unwarranted extension of the doctrine of implied powers of corporations.

North Side Ry. Co. vs. Worthington, 88 Texas 562, 30 S. W. 1055, contains the following language:

"Corporations are the creatures of the law, and they can only exercise such powers as are granted by the law of their creation. An express grant, however, is not necessary. In every express grant there is implied a power to do whatever is necessary or reasonably appropriate to the exercise of the authority expressly conferred. The difficulty arises in any particular case whenever we attempt to determine whether the power of a corporation to do an act can be implied or not. The question has given rise to much litigious controversy and to much conflict of decision. It is not easy to lay down a rule by which the question may be determined; but the following, as announced by a well-known text writer, commends itself, not only as being reasonable in itself, but also as being in accord with the great weight of authority. 'Whatever be a company's legitimate business, the company may foster it by all the usual means. But it may not go beyond this; it may not, under the pretext of fostering, entangle itself in proceedings with which it has no legitimate concern. In the next place, the courts have, however, determined that such means shall be direct, not indirect—i. e. that a company shall not enter into engagements, as the rendering of assistance to other undertakings from which it anticipates a benefit to itself, not immediately, but mediately by reaction, as it were, from the success of the operations thus encouraged; all such proceedings inevitably tending to breaches of duty on part of the directors, to abandonment of its peculiar objects on part of the corporation.' Green's Brice, Ultra Vires, 88. In short, if the means be such as are usually resorted to, and a direct method of accomplishing the purpose of the incorporation, they are within its powers. If they be unusual, and tend in an indirect manner only to promote its interests, they are held to be ultra vires."

Fletcher, Cyc. Corporations, Page 1770, uses the following language:

"In order that a corporation may have the implied power to do a particular act, the act must be directly and immediately appropriate to the execution of the specific powers granted by the charter and not bear merely a slight or remote relation to them."

See also the case of Mitchell vs. Hydraulic Building Stone Company. 129, S. W. 148.

It is claimed that since the organization of general agency territories for the sale of the policies of the assurance company will aid in the sale of such policies, benefitting the National Founders, Inc., as a stockholder, and since it has the right to be such stockholder, the power to organize the territories is a necessary incident thereto. Applying the language of the Worthington Case, supra, we think that such acts are not "necessary or reasonably appropriate to the exercise of the authority expressly conferred."

It appears, moreover, by the terms of the contract between National Founders, Inc., and American Hospital Assurance Company that National Founders, Inc., is to receive Ten Thousand (\$10,000.00) Dollars for each general agency territory organized by it. This is a strong indication to us that National Founders, Inc., was motivated in agreeing to organize these territories by other reasons than its desire to be of as much benefit possible to the corporation whose stock it owns. We find nothing in the provisions of Subdivision 50 of Article 1302 which authorizes a corporation doing business thereunder to enter into an enterprise of this character.

Generally speaking, it is illegal for one corporation to give away its assets for the promotion of other enterprises. Cook on Corporations, Section 681.

Holding as we do that the sale by National Founders, Inc., of the unit agreements described is ultravires and unauthorized, it is not necessary for us to pass on the other questions propounded in your letter.

This opinion is substituted for a prior opinion on the same state of facts, which opinion contained a discussion of matters not necessary to a decision on the facts presented.

Very truly yours,

MAURICE CHEEK,
Assistant Attorney General.

OPINIONS RELATING TO DEPOSITORIES

Op. No. 2870

COUNTY DEPOSITORIES—PLEDGE CONTRACTS, COUNTY AND DISTRICT CLERKS TRUST FUNDS.

1. A commissioners' court has power to select the county depository and to enter into a pledge contract with such bank so selected, accepting liberty bonds in amounts equal to such deposits as security for such funds so deposited with such depository.

2. A substantial compliance with the statutes with reference to selecting such depository and executing the pledge contract will be sufficient to bind the parties thereto, especially where all parties have acted upon the same.

3. It was the purpose of the Forty-second Legislature, in enacting what is known as the county and district clerks trust fund act, to treat funds in possession of such clerks belonging to individuals, pending litigation, as public funds.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, October 13, 1931.

Hon. James Shaw, Banking Commissioner, Capitol, Austin, Texas.

DEAR SIR: This acknowledges receipt of your favor to this department of recent date, wherein you request an opinion with reference to funds in possession of the Abilene State Bank, when the same was closed and ceased operation, alleged to belong to the County of Taylor, it claiming to be a secured creditor by virtue of a certain pledge contract entered into by and between Taylor County, acting through the commissioners' court, and the Abilene State Bank.

The facts pertaining to same as shown in your letter and accompanying correspondence and records of the commissioners' court, we understand, to be substantially as follows:

When the Abilene State Bank closed for liquidation, its books showed a balance of \$58,349.59 in favor of various funds belonging to Taylor County, secured by \$65,000 in liberty bonds under an escrow agreement with a Fort Worth bank. The escrow agreement was entered into in pursuance to a pledge contract, entered into by and between Taylor County and the Abilene State Bank for the purpose of securing the county deposits.

There was also a credit in favor of W. P. Bounds, County Clerk, as trustee, in the amount of \$6,725.51, representing funds deposited by him which were placed in his possession as the result of pending litigation in the County Court of Taylor County, Texas. Taylor County has filed a claim with the liquidating agent for said bank, claiming to be a secured creditor, and seeks to have both of the above amounts secured by the bonds in the Fort Worth bank and paid from the proceeds thereof.

It further appears that on or about the 19th day of January, 1931, the commissioners' court duly advertised for competitive bids for the purpose of securing a county depository, and, in pursuance to such advertisement, the county did not receive any sealed nor competitive bids, but on or about the last day of February, 1931, the commissioners' court received a written proposal from the four banks located at Abilene, Texas, including the Abilene State Bank, which was substantially as follows:

"We propose to jointly act as the county depository for Taylor County

of the county funds of said county, including the tax collector's deposit, to be deposited in said four banks, and said four banks agree through a board, to be selected from among their own members, to keep the aggregate deposits of the county so proportionately deposited in the four respective banks to the end that the amount of the county funds on deposit with any one bank at all times shall be in the same proportion as the ratio of each bank's total deposit shall be to the total deposit of the other three banks, and further agree to pay two and one-half per cent (2½%) on all daily balances."

It was further proposed that the Farmers & Merchants National Bank would act as a clearing house, and that if the proposal were accepted they would comply with the laws with reference to depositories by pledging their securities to secure the county on all deposits.

On or about the same day the commissioners court, by orders duly entered of record, accepted the proposal of the four Abilene banks and, in pursuance to said agreement, separate pledge contracts were entered into, placing the securities in escrow to secure such county deposits, which escrow agreement and pledge contracts appear to be executed in due form.

The proposals and pledge contracts were duly submitted to the Comptroller of Public Accounts and ratified on or about the 1st day of April, 1931, and an order was duly entered by the commissioners' court confirming the designation and appointment of the county depository.

At the Fourth Called Session of the Forty-first Legislature there was passed what is known as the Clerks Trust Fund Act, which became effective on the 10th day of February, 1931, and in pursuance to such act the Commissioners' Court of Taylor County on or about February 24, 1931, after request and notice by the county judge for competitive bids to the four Abilene banks, met and the four banks presented to the county judge and the commissioners' court a non-competitive unsealed written proposal to the effect that the trust funds in the hands of the county and district clerks be handled in the same manner and under the same provisions and in accordance with the depository contracts previously made for the county and state funds, with the further provision that the county clerk's fund would be deposited with the Abilene State Bank and the district clerk's fund with one of the other banks. These amounts being small, it was proposed that they be secured by the same collateral as county and state money and were to be taken into consideration in apportionment of the total funds in each bank.

The commissioners' court met on March 9, following, and accepted the proposal, such acceptance being evidenced by orders duly entered of record.

You desire to know whether or not the depository contracts and pledge of securities, based upon the above facts, are a valid and binding obligation upon the Abilene State Bank, or whether there has been such variance in compliance with the depository laws with reference to such funds as to render the pledge contract null and void.

Inasmuch as you have two questions involved, the first of which involves what is commonly known as "county depository funds", and the second what has been designated by the legislature as "trust funds in the hands of district and county clerks", and the law pertaining to those two funds being in some particulars different, we deem it advisable to discuss them separately, and will take up and treat the county depository funds first.

It cannot be questioned that the county, acting through its commissioners' court, has the power to enter into pledge contracts with state banks for the purpose of securing public funds belonging to a county. It is also well settled by express legislation that a state bank has full power to enter into such contracts and pledge certain securities owned by it for the purpose of obtaining county funds and being designated as a county depository in order to secure the county

with reference to such funds. See in this connection the following authorities with reference to the above powers of state banks and county commissioners' court: Farmers State Bank vs. Brazoria County, 275 S. W. 1103 (writ of error refused); Hidalgo County Water District vs. San Juan State Bank, 280 S. W., 845;; Austin vs. Lamar County, 26 S. W. (2d) 1062; Article 2547. R. C. S., 1925, as amended by the Forty-first Legislature.

The manner and method of selecting county depositories for ordinary county funds not including the trust funds above mentioned by competitive bids, is set forth and provided in Articles 2544 to 2546, inclusive, Revised Civil Statutes of 1925. As evidenced by the facts as set forth above, it is apparent that the Commissioners' Court proceeded to obtain a county depository by the competitive bid method. It is our opinion, however, that the facts cannot be construed to the effect that they received a competitive bid from the four banks mentioned. But, be that as it may, the Commissioners' Court has full power and authority to designate one or more banks as a county depository even though no competitive bids are received as provided and set forth in Article 2550, Revised Civil Statutes of 1925, the same reading as follows:

"If for any reason there shall be submitted no proposals by any banking corporation, association or individual banker to act as county depository, or in case no bid for the entire amount of the county funds shall be made or in case all proposals made shall be declined, then in any such case the commissioners' court shall have the power, and it shall be their duty, to deposit the funds of the county with any one or more banking corporations, associations or individual banker, in the county or in adjoining counties in such amounts for such periods as may be deemed advisable by the court, and at such rate of interest, not less than one and one-half per cent per annum, as may be agreed upon by the court and the banker or banking concern receiving the deposit, interest to be computed upon daily balances due the county treasurer. Any banker or banking concern receiving deposits under this article shall execute a bond in the manner and form provided for depositories of all funds of the county, with all the conditions provided for the same, the penalty of said bonds not to be less than the total amount of the county funds to be deposited with such banker or banking concern."

From an examination of the contract and the records of the Commissioners' Court submitted to us, we think there has been a strict conformity with the statutes with reference to the selection of the county depository with reference to the county funds proper, not including the trust funds, and that the pledge contract entered into by and between the four banks, including the Abilene State Bank, is a valid and binding obligation on both the Abilene State Bank and the County of Taylor, and by reason thereof the County of Taylor should be considered and construed to be a secured creditor as against the Abilene State Bank. It would naturally follow that Taylor County, with reference to the county funds proper, would be entitled to have the liberty bonds sold and so much of the proceeds as necessary derived from the sale thereof paid to it in order to discharge the \$58,349.59 county deposit in possession of the Abilene State Bank when it closed its doors and was placed in the process of liquidation.

With reference to the county clerk trust funds referred to in your

inquiry, which were on deposit in the Abilene State Bank when its doors closed for business, in the name of the County Clerk as Trustee, we call your attention to the Acts of the Forty-first Legislature, First Called Session, page 21, Chapter 14, which provides the method of procedure and authority vested in the county commissioners' court for the purpose of selecting a depository in order to secure such deposits, the pertinent part of which being substantially as follows:

At the February term of the commissioners' court after each general election the commissioners' court is directed to receive sealed proposals from any banking corporation, association or individual banker in such county as may desire to be selected as the depository. Such sealed bids shall be filed with the county clerk at 10:00 o'clock on or about the 1st day of the term of court at which bids are to be received. If for any reason there shall be submitted no proposals by any banking corporation, association or individual banker in the county, or in case there shall be no bid for the entire amount of the trust fund, or in the event all bids are rejected, etc., then in that event the commissioners' court are directed to advertise for other proposals. In the first instance, however, it is not necessary to advertise for such bids.

The manner of qualifying as depository under this act shall be the same as that required of county depositories under the acts above referred to.

In no event shall county and district clerks be responsible for any loss of the trust funds through failure or negligence of any depositor. And in the event of the insolvency of any depository or if for any other reason, on account of the deposit of the trust fund with any depository there is a loss of any part of the funds, the county shall be liable to the person to whom any part of said trust fund is due for the full amount of said fund due such person.

It will be noted from an observation of this act that it does not expressly define such funds in the hands of a county or district clerk as public funds and, ordinarily, we do not think that such funds would be construed or considered as public funds unless they were considered as such by the Legislature. We think, however, by taking the entire act into consideration it is clear from the terms thereof that the Legislature intended that such funds should be considered and treated as public funds. As evidence of this intention it will be noted, in Section 3 thereof, that the banking corporation, association or individual banker so selected to qualify as county depository for trust funds shall qualify in the same manner as provided by law for an ordinary county depository. It will also be observed in Section 10 of said act that in all events the county shall be liable for any miscarriage or default on the part of such depository so selected and will hold the individuals entitled to such funds free of loss from any part thereof. Inasmuch as a county would have to use public funds to reimburse individuals for any default on the part of such depository, we think it is conclusive from this act that it was the intention of the Legislature to consider and treat these funds as public funds. As further evidence of the fact that the Legislature intended these funds to be treated as public funds, it will be noted that at the First Called Session of the Forty-first Legislature, the following act was passed:

"No bank or bank and trust company, except where specifically authorized by statute, or except in the case of deposit of public funds, shall

give preference to any depositor by pledging assets of the corporation as collateral security and any pledge of such assets contrary to this article shall be void."

It is an elementary rule of statutory construction that the Legislature is presumed to be conversant with all laws theretofore enacted pertaining to a subject when they subsequently legislate on such matter. It is also a familiar rule of statutory construction that where two constructions can be placed upon an act or acts of the Legislature, one of which would render an act or a portion thereof inoperative and the other would be such as to render the entire act or acts operative, such latter construction should be placed thereon.

If the county clerk and district clerk funds were to be construed as not to be public funds, the last above cited act of the Legislature would prohibit a bank from pledging its securities to secure such funds and would render that portion of the trust fund act above referred to inoperative with reference to permitting a bank to pledge its securities to secure such funds. Therefore, we think it clear that such funds are to be treated and considered as public funds.

It will be noted from an observation of this act that there is no provision in this act as in Article 2550, Revised Civil Statutes, giving the Commissioners' Court the express power to enter into a contract with a depository bank where no competitive bids are received. Nor is there any express inhibition in such act denying to the commissioners' court such power. It will also be observed from the facts that the county judge and commissioners' court proceeded in conformity with the statute in order to obtain a competitive bid but, of course, under the facts as stated, it could not be contended that the bid received was a competitive bid. The question then arises, under the facts and circumstances as stated, can the contract entered into by and between the commissioners' court and the Abilene State Bank be considered as a binding and valid obligation, or is the same null and void because not entered into in strict conformity with the statute?

This act has not been, so far as we have been able to ascertain, construed. There have, however, been many decisions on similar depository contracts for bonds. It has been universally held by the courts that a substantial compliance with the statute with reference to the selection of the depository and the execution of such bonds will be a sufficient compliance with the law. This rule seems to be well stated in the case of Carson, et al vs. DeWitt County, et al, 23 S. W. (2d) 411, where the court used the following language:

"The object of the Revised Statutes of 1925, Articles 2547-48 to 2556, relating to county depository bonds, is to require county commissioners' courts to safeguard public funds against loss through insolvency of depositories, and in the absence of express statutory provision it is not necessary, in order to bind obligors that bonds conform strictly, or even substantially, to form or conditions prescribed by statute, but if the commissioners perform the prescribed duty imperfectly, or in a manner not in strict compliance with the prescribed procedure, and yet effectuate the public purpose by other acts not prescribed, but not unlawful within themselves, the law will not nullify those acts to public injury at the behest of others who have profited thereby."

See also the following authorities:

Linz vs. Eastland County, 39 S. W. (2d) 599 (Com. Apps.).

New School District vs. Planters Bank, 273 S. W. 330.

Sullivan vs. City of Galveston, 34 S. W. (2d), 808.

Kopecky vs. City of Yoakum, 35 S. W. (2d), 492.

Regardless of the fact as to whether or not there has been such compliance with the statute as to whether or not the contract or bond entered into with reference to the trust fund would be construed as a statutory contract or bond, we think it would be considered and construed by the courts as a common law bond and be a binding and valid obligation. Sullivan vs. City of Galveston, 34 S. W., 808; Kopecky vs. City of Yoakum, 35 S. W., 492; Farmers State Bank vs. Brazoria County, 275 S. W., 1103 (writ of error refused).

In conclusion, we may add that it is our opinion that it was the intention of the Legislature to secure public funds with reference to providing the manner and method of selecting such depositories; and we are further of the opinion that there has been a substantial compliance with these statutes and inasmuch as the bank had had the benefit of the public funds for some eight or nine months under and by virtue of the terms of the contract above referred to, and all parties having acted in good faith upon the assumption that the contracts were valid and binding obligations, that the courts would hold both of such contract to be valid and binding obligations and you are accordingly so advised.

Very truly yours,

SIDNEY BENBOW,

Assistant Attorney General.

OPINIONS RELATING TO ELECTIONS AND SUFFRAGE

Op. No. 2832

POLL TAX—PAYMENTS BY MAIL—TAX COLLECTOR'S DUTY.

1. Where the taxpayer has paid the poll tax prior to February First, and furnished all information to the Tax Collector before said date, it is the duty of the Tax Collector to issue a receipt as of the date of payment.
2. Duty continues after February First, notwithstanding Article 198, Penal Code, Revised Civil Statutes, 1925.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, February 13, 1931.

Hon. Maury Maverick, Tax Collector, San Antonio, Texas.

DEAR MAURY: Your communication of February 12th submitting for the opinion of this Department the following, has been referred to the writer for attention:

"Approximately twenty taxpayers, residents of Bexar County, Texas, prior to February First, 1931, mailed to me, as Tax Collector of this County, their remittances for a poll tax together with all of the information required in order to issue a voting poll tax. Bear in mind these taxes were paid and information furnished me prior to February First, 1931, but due to the pressure of the business of my office, I was unable to issue the poll tax receipts prior to February First, 1931.

"Question: Is the Tax Collector authorized to issue a voting poll tax at this time under the foregoing circumstances?"

According to the statement of facts presented, it is evident that a number of taxpayers in your county have paid their poll tax in accordance with the provisions of Article 2963, as Amended by the Acts of the Forty-first Legislature, Fourth Called Session (See Chapter 51, page 111), which provides, in substance, that a poll tax may be paid and a receipt procured by sending money or bank check through the mail to the Tax Collector, and reads in part, and as applicable hereto, as follows:

"* * * Where a taxpayer residing either within or without a city of ten thousand inhabitants, or more, has a poll tax assessed against him or his wife, or both, he may at the same time that he pays his property tax, by bank check or money order, also pay the poll tax of himself or wife, or either, and in the same way, and it shall be the duty of the Tax Collector, in such cases, to mail such poll tax receipts, together with the property tax receipts, to such property taxpayer. * * *"

While the foregoing Article refers to a poll tax that has been assessed against a person, we do not think that an assessment is necessary in order to allow the payment thereof by mail. A "poll tax" is a tax against a person and in this State every person between twenty-one and sixty years of age, with certain exceptions, is subject to the payment thereof.

You state in your letter that the taxpayers not only paid their poll tax prior to February First in the manner provided in the foregoing

article, but also furnished you with the proper information to fill in said receipt blank as required by Article 2965, Revised Civil Statutes.

The real, and only, question involved is whether or not the Tax Collector can issue a 1930 voting poll tax receipt after January 31, 1931.

Article 198, Penal Code, provides:

“ * * * Any Tax Collector, or anyone in his employ, who issues a poll tax receipt after the First day of February in any year bearing a date prior to the First day of February * * * shall be fined not less than One Hundred Dollars nor more than Five Hundred Dollars.”

In the case of Parker vs. Busby, 170 S. W. 1042, the Court of Civil Appeals passed on the question as to whether or not the Tax Collector had authority to issue a voting poll tax receipt after February First, bearing a date prior thereto. The facts are here briefly stated. The petitioners brought mandamus proceedings to compel the Tax Collector to issue a poll tax receipt to them and date the receipts as of January 30, 1911. The petitioners appointed agents, as provided by Article 2944, Revised Statutes, 1911, to pay their poll tax. The proper written authority was executed and given to the agent, and all information necessary for the Tax Collector to fill out the receipts was included in the authority granted. The Court held that if the plaintiffs paid, or tendered payment, of their poll tax before February First, it was the Tax Collector's duty to issue receipts therefor, and stated further, in clear and explicit terms, that this duty on the part of the Tax Collector continued after the day of payment, notwithstanding Penal Code 1911, Article 224 (which is present Article 198, Revised Civil Statutes 1925).

“It seems to us clearly to be the spirit of the law to prevent the Collector receiving payments of poll taxes and issuing receipts therefor after February First, and *not to prohibit the issuance* of receipts for such taxes paid, or tendered, prior to that date.”

“Where a poll tax is tendered within the time specified, the Collector has no discretion but to receive it and issue a receipt therefor, though he is in doubt as to the right of the payer to vote, and when the tax is paid within the time specified, it is the duty of the Collector to issue *a receipt as of the date of payment*, though on a subsequent date, notwithstanding Penal Code 1911, Article 224. * * * .”

“ * * * The Taxpayer, when he tenders through his agent duly authorized in writing to the Tax Collector an amount sufficient to pay the tax, is then entitled to a receipt, *and has done all that the law requires of him in order to obtain.*”

Parker vs. Busby, 170 S. W. 1042.

The facts as presented in your inquiry are very similar to the facts in the case of Parker vs. Busby. The only difference being that the taxpayers in Bexar County have paid their poll tax and furnished the proper information by sending same through the United States mail to the Collector, whereas, in the case cited, the taxpayers allowed an agent to act for them.

The taxpayer has paid the poll tax, furnished the Tax Collector with all the information required, prior to February First, and in doing so, in our opinion, he has done all that the law requires of him

in order to obtain a poll tax receipt. Certainly it cannot be said that the Tax Collector would have authority under such circumstances to deprive a person of his right to exercise the franchise granted him by the Constitution of this State.

Therefore, it is our opinion, and you are so advised, that where the taxpayer has paid the poll tax prior to February First and furnished you with the proper information before said date on which to issue said receipt, that it is your duty as Tax Collector to issue to the person a receipt as of the date of payment, though the date of issuance is after February First, 1931.

Very truly yours,
 EVERETT F. JOHNSON,
 Assistant Attorney General.

Op. No. 2899.

ELECTIONS—STATUTES CONSTRUED—SECRETARY OF STATE—DUTY TO
 CERTIFY NAMES OF STATE NOMINEES TO COUNTY CLERKS — TIME
 WHEN CERTIFICATE SHOULD BE MADE

1. It is the duty of the Secretary of State to certify the names of nominees of the Democratic Party of Texas for state office to the respective county clerks.

2. It is not to be presumed that the Legislature intended to create a hiatus in the law; rather the contrary is to be presumed. Where it is possible to do so from a reading and from construction of the whole of statutory provisions, any gap or omission in the express wording of the statute should be filled in by construction if the legislative intent can be ascertained and given effect by so doing, thus applying the rule of construction to the effect that that which arises by necessary implication is as much a part of the law as that which is expressly provided.

3. The Secretary of State should certify the names of nominees for state office to the several county clerks of this state at the same time he certifies the nominees for district office, which is not later than October first, or at least within sufficient time to permit the county clerks of this state to perform their statutory duties, taking into consideration a reasonable time for the transmittal of the certificate, preparation by the county clerks of ballot form, the not-less-than ten days which the names certified must be posted, the time necessary to have ballots printed, and the fact that the ballots must be prepared so as to permit absentee voting twenty days before election day.

OFFICES OF THE ATTORNEY GENERAL,
 AUSTIN, TEXAS, September 28, 1932.

Mrs. Jane Y. McCallum, Secretary of State, Austin, Texas.

DEAR MADAM: Your letter of September 26th addressed to Attorney General Allred has been received.

"A careful search fails to reveal the existence of any statute requiring the Secretary of State to certify the names of State officers to the county clerks for inclusion in the official ballot for the general election.

"It has been the custom of this office to make such certification at the same time the forms required by Article 2925 are furnished, that is, 'at least thirty days before each general election'. It would appear, however, that such certification might be delayed until at least twenty days before the election, in view of the provisions of Article 3165.

"Your opinion is requested as to whether this custom is a proper one."

Your letter raises two questions, to-wit:

First. Is it the duty of the Secretary of State to certify the names of the nominees of the Democratic Party of Texas for state office to the respective county clerks?

Second. If this question is answered in the affirmative, then at what time does it become the duty of the Secretary of State to make this certification?

These questions will be discussed in the order in which they appear above.

While no statute in terms prescribes that the Secretary of State shall certify the names of nominees for state offices to the county clerks of this state, except the names of independent candidates (Art. 3161), yet all nominations for state offices are certified to the Secretary of State. (Arts. 3138, 3157, 3159, R. C. S. 1925.) Under Article 3132, Revised Civil Statutes, 1925, the county clerks are directed to post in a conspicuous place in their offices the names of all candidates whose names have been certified to them, to be printed on the official ballot, and they are directed to order such names printed on the official ballot as otherwise directed in the statutes, that is, as directed by Article 3131.

Article 3132, supra, reads:

"Each county clerk shall post in a conspicuous place in his office for the inspection of the public, the names of all candidates that have been lawfully certified to him, to be printed on the official ballot, for at least ten days before he orders the names to be printed on said ballot; and he shall order all the names of the candidates so certified printed on the official ballot as otherwise provided in this title." (See Art. 3131.)

Under the article above quoted, it would clearly be the duty of the county clerk to post the names of all the candidates lawfully certified to him, including candidates for state and district offices.

Article 2978, Revised Civil Statutes, 1925, with respect to the official ballot for the general election in November, in part reads:

"It shall contain the printed names of all candidates whose nominations for an elective office have been duly made and properly certified."

Therefore the official ballot must contain the names of all candidates whose nomination has been properly certified, and necessarily can contain no name that has not been thus certified.

It can be seen from the above statutes that it is the duty of the county clerk to make up the form of the official ballot for his county with the names of nominees that have been properly certified to him. Other provisions of the statutes provide that the state and district conventions shall canvass the votes, declare the nominees, and through their chairman and secretary certify the names of such nominees to the Secretary of State, as hereinabove pointed out.

As above stated, there is no express provision contained in the statutes requiring the Secretary of State to certify the names of nominees for state offices so certified to that official, to the county clerks in the various counties of the state, except for independent candidates; nor is there any provision in the statutes that any other official shall certify the nominees for state offices to the county clerks,

except where there has been a final determination of a contest for such an office, in which event Article 3152, as amended by the Acts of the Forty-second Legislature, Chapter 241, provides that a certified copy of the judgment of the district court shall be transmitted to the officers charged with the duty of providing the official ballot.

It is not to be presumed that the Legislature intended to create a hiatus in the law; rather the contrary is to be presumed. Where it is possible to do so from a reading and from construction of the whole of the statutory provisions, any gap or omission in the express wording of the statute should be filled in by construction if the legislative intent can be ascertained and given effect by so doing. It is an elementary rule of construction that that which arises by necessary implication is as much a part of the law as that which is expressly provided.

Here we have the names of all state nominees certified to the Secretary of State and the statutes prohibiting the county clerk from ordering any name printed on the official ballot which has not been duly certified to him. The writer has found no statutory provision requiring any person or any state or election official to make a certificate of the nominees to the county clerk. It is therefore necessary to determine the legislative intent as to how the certification of nominees of state offices was to be placed in the hands of the several county clerks of this state. You are advised, that it is the duty of the Secretary of State to make this certification of the names of the nominees for state office to the several county clerks of this state, because the Secretary of State is the only person in a position to so certify, since the statutes require the certificate of nomination to be made only to him, and since the statutes expressly require him to certify the names of independent candidates for state office, it seems to follow by necessary implication that he is the person who must certify the names of the state nominees to the several county clerks. The provision for certification for one group of candidates in the same class should be construed, in the absence of a provision for another group, as applying to all candidates in that class. The Secretary of State has always performed this duty and has considered that it was necessary for him to make this certification to the county clerks of Texas in order for them to prepare the official ballots.

We now come to the question as to the time when the Secretary of State shall perform the duty of making the certification of nominees for state office to the several county clerks.

You state that it has been the custom of your office to make such certification at the same time the forms required by Article 2925 are furnished, that is, at least thirty days before each general election. Article 2925 reads:

"At least thirty days before each general election the Secretary of State shall prescribe forms of all blanks necessary under this title and furnish same to each county judge."

This article has no application whatever to the certification by the Secretary of State to the county clerks of the names of the nominees for state office. There are certain blank forms which are used by

the county authorities for the printed matter needed in the management of the election, in fact you so state in your letter. The certificate of the Secretary of State certifying the names of the nominees duly certified to his office entitled to have their names placed upon the ballots when finally printed, is neither a form nor a blank to be used in the general election. Such certificate is made, as we have seen, to the county clerk, whereas Article 2925 requires the forms of blanks necessary under the law to be furnished, to be sent to the county judge at least thirty days before the election.

In this regard, your attention is called to the fact that it would be necessary for the county clerk to have posted the names of the nominees at least ten days before it would be necessary for the county judge or himself to have these forms or blanks in their hands. In other words, under the statutes the county clerk cannot order the ballots printed until he has posted the names of the nominees certified to him not less than ten days before ordering the same to be printed.

The provisions of Article 3132, *supra*, require the county clerk to post the names of all candidates certified to him to be printed on the official ballot for at least ten days before he orders such names to be printed on said ballots. We call your attention to Article 2956, Revised Civil Statutes, 1925, as amended by the Acts of 1931, Forty-second Legislature, Chapter 105, Page 180, which in part reads:

“Any qualified elector, as defined by the laws of this state, who expects to be absent from the county of his or her residence on the day of election, may vote, subject to the following conditions, to-wit: at some time not more than twenty days nor less than three days prior to the date of such election, such elector shall make his or her personal appearance before the clerk of the county of his or her residence and shall deliver to such clerk his or her poll tax receipt, or exemption certificate, entitling him or her to vote at such election, and said clerk shall deliver to such elector one ballot which has been prepared in accordance with the law for use in such election, which shall then and there be marked by said elector, apart and without the assistance or suggestion of any person, and in such manner as said elector shall desire same to be voted; * * *.”

It will be noted from the above quoted statute that it is contemplated that a voter shall have the privilege of voting twenty days before the election if he is to be absent from the county on election day and desires to take advantage of the privilege therein provided. The ten days required for posting, and the permitting of absentee voting twenty days before election day, accounts for thirty days, without considering the time necessary to transmit the certification made by the Secretary of State to the several county clerks of Texas, and the time necessary for the county clerk to make up the form of the ballot, and the time necessary to print the ballot after the names have been posted the required ten days. Surely if the Secretary of State is required to make the certification as above specified, then it should be made in time to enable the county clerks to obey the statutes hereinbefore discussed. It is a matter of common knowledge that from one to three days would be required from the time the Secretary of State makes the certificate to transmit it from the seat of government to the county clerks whose counties are farthest re-

moved from the seat of government. It would also require several days in which to have the ballots printed. It can thus be seen that a certificate from the Secretary of State thirty days before the general election would not afford to the county clerks sufficient time to perform their statutory duty and have the ballots printed twenty days before the general election.

We are not unmindful of the rule that when the construction of a statute is doubtful, the construction given it by officers of the state charged with the duty of its enforcement, is entitled to great weight, and we have kept in mind the provision of your letter stating that it has been the custom of your office to make the certification at least thirty days before each general election. However, in that regard we call your attention to the fact that Article 2956, supra, was amended by the Forty-second Legislature so as to permit absentee voting not more than twenty days before the election, and that theretofore absentee voting had been permitted not more than ten days before the election. It can thus be readily seen that it requires an additional ten days under the present law to permit the county clerk to perform his duty under the statute, which was not required during the election in 1930 and previous elections thereto.

Article 3135, Revised Civil Statutes, 1925, requires the Secretary of State to certify the names of nominees for district office not later than October first of such year. Common sense dictates that the Secretary of State should at the same time certify the names of the nominees for state office which have been duly certified to her. It is in keeping with the spirit of the statutes pertaining to elections that all official certifications should be made by the Secretary of State at one time to enable the respective county authorities immediately thereafter to proceed regularly with the formation of the complete official ballot for such county. The specific requirement of Article 3135 that such certificate of the Secretary of State as to nominees for district office must be "*not later than October first,*" is the only place in the statutes where the time is fixed for the certification by the Secretary of State to the respective county clerks, except where a nominee has died or declined the nomination, as provided in Article 3165, Revised Civil Statutes, 1925, which is to permit the Secretary of State to make a correction in his prior certification where necessary on account of the circumstances therein mentioned.

Although a nominee has died or declined the nomination, his name would have to be certified to the various county clerks along with the names of the other nominees so certified, and unless a nomination is made to fill the vacancy so created, the name of the candidate who has died or has withdrawn his candidacy should be printed on the official ballot in the proper column. (Art 3019, R. C. S. 1925.) Article 3165, therefore, makes provision only for the correction of a certificate already made, where a vacancy in the nomination has been filled in accordance with the provisions of said article.

There is no apparent reason why the district candidates should be certified not later than October first and the state candidates at a later date. The statutes in no place provide that the Secretary of State shall make two separate certifications. Indeed such a pro-

cedure would tend to confuse the officials making up the final completed ballot, and certainly if made much later would not enable such officials to both post the names of candidates as required by law and print the official ballots in sufficient time to permit absentee voting twenty days before the date of the general election.

In certain instances certification of the names of nominees to the county clerks would have to be made *before* October first. For example, the following hypothetical case will illustrate the point: Since general elections are held on the first Tuesday after the first Monday in November, it is possible that a general election day would fall on the second day of November. If such were the case, certification by the Secretary of State of the names of the various nominees, state and district, on October first would not be in sufficient time to permit the various county clerks to comply with the duties imposed upon them by statute, as shown by the discussion herein.

Should it be argued that the date set forth in Article 3135 providing the time within which the certification must be made by the Secretary of State of nominees for district office does not apply to certification of nominees for state offices, then it would still be necessary for the Secretary of State to certify in sufficient time to enable the county clerks to comply with the other statutory provisions hereinbefore discussed, and when we consider the time necessary for the transmittal of the certificate of the Secretary of State to the several county clerks, the time necessary for the county clerk to compile the form of the official ballot, the not-less-than ten days required for posting before the clerk can order the names printed on the ballots, the time necessary for the printing and return to the county clerks of the ballots so as to permit absentee voting twenty days before election day, we can see the necessity, even in the case of state officers, of requiring the Secretary of State to certify the names of the nominees which have been duly certified to her in ample time to permit the county clerks to perform their statutory duty.

Since the general election is to be held this year on November 8th, and since there seems to be no reason why the certificate of the Secretary of State cannot be made at the present time, you are advised, that you should certify the names of the nominees for state office to the several county clerks of this state at the same time you make your certificate of nominees for district office, which is not later than October first, or a least within sufficient time to permit the county clerks of this state to perform their statutory duties as herein discussed, taking into consideration a reasonable time for the transmission of your certificate and the preparation by the county clerks of the ballot form and the time necessary to have said ballots printed, in addition to the time required for the posting of the names to be printed on said ballot, and keeping in mind the fact that the ballots must be prepared so as to permit absentee voting twenty days before election day.

Yours very truly,

HOMER C. DEWOLFE,
Assistant Attorney General.

OPINIONS RELATING TO INSURANCE

Op. No. 2880

INSURANCE—MUTUAL COMPANIES.

Counties, cities and school districts have authority to insure property in mutual fire insurance companies organized under Texas laws.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, March 23, 1932.

*Hon. S. M. N. Marrs, State Superintendent of Public Instruction,
Austin, Texas.*

DEAR SIR: The Attorney General is in receipt of the following inquiry:

"Are counties, cities and school districts in Texas permitted by law to insure property in mutual fire insurance companies?"

The question is submitted by an individual whom the Attorney General is prohibited by Article 4399, Revised Civil Statutes of Texas, 1925, from advising, but, since the question is one of considerable importance, we have concluded to write an opinion expressing our views in regard thereto and direct the same to you for future reference.

Article 4867, Revised Civil Statutes of 1925, provides with whom corporations may contract, and reads:

"Any public or private corporation, or association in this State or elsewhere may make applications, enter into agreements for and hold policies in any such mutual insurance company. Any officer, stockholder, trustee or legal representative of any such corporation, board, association, or estate may be recognized as acting for or on its behalf for the purpose of such membership, but shall not be personally liable upon such contract of insurance by reason of so acting. The right of any corporation organized under the laws of this State to participate as a member of any such mutual insurance company is hereby declared to be incidental to the purpose for which such corporation is organized and as much granted as the rights and powers expressly conferred."

This provision of the statute was re-enacted verbatim by the Forty-first Legislature at its first called session. (Sec. 8, Ch. 40, p. 91).

The right to insure in mutual insurance companies having been expressly granted and delegated by the legislature to public corporations, it would appear that the inquiry should be answered in the affirmative, unless the legislature has exceeded its authority in so enacting such a provision.

The question then presents itself as to whether this act contravenes any provision of our Constitution. Section 52 of Article 3 of the Constitution of the State of Texas, reads:

"The legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of this State to lend its credit or to grant public money or thing of value in aid of or to any individual, association or corporation whatsoever, or to become a stockholder in such a corporation, association or company."

Section 3 of Article 11 of the Constitution of the State of Texas reads:

"No county, city or other municipal corporation shall hereafter become a subscriber to the capital of any private corporation or association or make any appropriation or donation to the same, or in anywise loan its credit; but this shall not be construed to in any way affect any obligation heretofore undertaken pursuant to law."

In order to determine whether the legislative act contravenes our Constitution, it becomes necessary to consider the nature of the mutual insurance contract. Mutual fire insurance companies are entirely different from mutual assessment life insurance companies and are in the main governed by Chapter 9, Revised Civil Statutes of Texas for 1925, and the amendments thereto. Article 4860a, as amended, Acts Forty-first Legislature, First Called Session, prescribes policy provisions and reads:

"The policies shall provide for a premium or premium deposit payable in cash and, except as herein provided, for a contingent *premium at least equal to the premium or premium deposit*. Such a mutual company may issue a policy without a contingent premium while, but only while, it has a surplus equal to the capital required of a domestic stock insurance company transacting the same kind of insurance, but any such company may issue a policy providing that the holder of any such policy *shall be liable for no greater amount than the premium or premiums deposit expressed in the policy*. If at any time the admitted assets are less than the unearned premium reserve, other liabilities and the required surplus, the company shall immediately collect upon policies with a contingent premium *a sufficient proportionate part thereof to restore such assets, provided no member shall be liable for any part of such contingent premium in excess of the amount demanded within one year after the termination of the policy.* * * *"

Thus it will be noted that policies of insurance issued by mutual insurance companies provide for a *definitely stated* premium or a so-called premium deposit *payable in cash*. Such policies also, where the company has no surplus "equal to the capital required of a domestic stock insurance company transacting the same kind of business", provides for a so-called "contingent premium" equal to *but not exceeding* the premium deposit. The result is that under the insurance contract, issued by a mutual insurance company, the entire premium collectable in any event is definitely stated, one-half of the premium is deposited in cash, and the other one-half, the amount of which is definitely fixed by the terms of the contract, is payable in the future, provided the actual experience of the company should require such payment. In other words, the members or policyholders of a mutual fire insurance company, in addition to being responsible for one annual premium, are liable for another annual premium, the exact amount of which is always fixed and determined in the beginning by the terms of the policy issued.

The collection of the so-called contingent premium", or a part thereof, is authorized where the admitted assets are less than the unearned premium reserve, other liabilities and the required surplus. This entire "contingent premium" may be collected where that is necessary for the purpose stated, or "a sufficient proportionate part thereof to restore such assets."

Article 4860a (Subdivision (d), Sec. 7, Ch. 40, Acts Forty-first Legislature, First Called Session) provides that the company is required to collect a premium in advance on each application; the total of which premium shall be held in cash or securities and is required to have and maintain at all times cash and invested assets of not less than \$50,000.00 if it be a casualty insurance company, and not less than \$20,000.00 if the company be other than a casualty insurance company.

The use of the word "contingent" in describing the "contingent premium" to be paid under the conditions of fact named in the statute has created confusion of thought and resulting misconception of the true nature of the mutual insurance contract as defined in our statute. The liability for one-half of the premium is contingent but it is not an unlimited liability; the liability is definitely fixed and determined in the beginning and is a limited liability. The Honorable C. M. Cureton, Former Attorney General, now Chief Justice of the Supreme Court of the State of Texas, wrote an opinion as to the extent of liability of policyholders of mutual fire insurance companies. To quote from that opinion:

"In addition to one annual premium the statute makes each policyholder liable for another annual premium; this liability is absolute and can neither be waived or avoided when needed. * * * The shareholders, members or stockholders, by whatever term they may be known, of a mutual fire insurance company are not responsible for the debts of the corporation, except and to the extent specified in the act authorizing the incorporation of such company." (Report and Opinions, Attorney General of Texas, 1916-1918.—No. 1662).

Mutual insurance companies must operate on a different basis from stock insurance companies. This results from the fact that the mutual companies do not attempt to do business at a profit but seek to furnish insurance at cost. In attempting to operate on such a plan, the company cannot determine what the cost will be to the assured at the time the policy is written. If all of the premium is not collected in advance the company says in effect "I promise to insure in return for your promise to pay a premium, the exact amount of which shall be determined later but which in no event shall exceed X dollars." It will become apparent that by insuring in mutual insurance companies, the public corporations do not assume any liability that is unlimited, for the limit of obligation is fixed at the time the insurance is obtained and, according to the statute governing such companies, cannot be enforced beyond the limit fixed.

A municipal corporation in taking out insurance with a mutual fire insurance company does not enter into a contract by which the use of its credit is furnished to the insuring company as consideration for the insurance written. What it really does, is to make a direct, outright purchase of insurance protection, agreeing to pay therefor either one of two definitely stated prices, or some price between the two. And as to any part of such price in excess of the minimum named, it is permitted to make payment at the end instead of at the beginning of the insurance term.

The mutual insurance company is an entity quite as distinct from

its policyholder members as is the stock insurance company from its stockholder member. In insurance policies, mutual and stock insurance companies alike, the insurance corporation promises to indemnify the assured for a particular loss in return for a stated consideration. It is only in the form of the consideration that there is any difference between the policies issued by the two classes of companies. The consideration for the policy, called a premium, in practice consists either of an outright payment of money or a promise to pay money in the future. With the stock companies it is usually the former; with mutual companies it is either the latter or a combination of the two.

The substance of the transaction is exactly the same, whether the premium be all paid down when the policy is issued or whether the payment of a part of it be deferred until the end of the policy term and an additional amount be then paid, determined by the actual experience of the company, so long as there is a limit definitely fixed by contract in the beginning beyond which the amount of the premium cannot go in any event.

The entire subject is discussed in a very illuminating manner in an opinion of the Supreme Court of Pennsylvania, involving the right of a school district to insure its property in a mutual company. In the course of the opinion in the case of *Downing, et al vs. School District of City of Erie, et al*, 147 Atlantic 239, 297 Pennsylvania 474, the court said:

“The responsibility of an *additional limited* assessment is part of the *consideration*, and it so appears in the contract. There is no loaning of credit by the school district to the insurance company, but rather by the *latter to the former*, since it does not require the immediate payment of the amount of contingent liability, *but refrains from asking presently more than one-fifth thereof, having under no circumstances the right to demand more than the maximum*. ‘Assessments’ and ‘premiums’ are interchangeable words, and mean the same thing. They are the consideration for the contracts. *Hill vs. Farmers’ Mut. Fire Ins. Co.*, 129 Mich. 141, 88 N. W. 392.

“(3,4) The court below was of the opinion that, though the right to insure in a mutual company was expressly given by the Act of 1925, yet this statute was in conflict with the constitution, which provides (Art. 9, Sec. 7): ‘The General Assembly shall not authorize any county, city, borough, township or incorporated district to become a stockholder in any company, association or corporation or to obtain or appropriate money for or *to loan its credit* to, any corporation, association, institution or individual.’ It must be kept in mind, in passing upon the question raised, that all presumptions are to be drawn in favor of the validity of the legislation (*Kennedy vs. Meyer*, 259 Pa. 306, 103 A. 44; *Speer vs. School Directors*, 50 Pa. 150), and that a statute is not to be declared unconstitutional unless this conclusion is so plainly apparent as to leave no doubt. *Keator vs. Lackawanna County*, 292 Pa. 269, 141 A. 37.

“Our constitutional provision was designed to prevent municipal corporations from joining as stockholders in hazardous business ventures, loaning its credit for such purposes, or granting gratuities to persons or associations where not in pursuit of some governmental purpose. Taking of insurance in a mutual company with limited liability is not within the inhibition, for the district does not become strictly a stockholder, nor is it loaning its credit. It agrees to pay a *fixed* sum, and can be called upon for the *total* only in case of some unusual catastrophe causing great loss. Until this contingency arises it is required to advance but a small portion of the maximum and is, in effect, loaned credit as to a possible future de-

mand *by the company* for the balance which may become payable. By the terms of the policy the district did not assume responsibility for the losses of others insured except as to a named and limited amount. The act of 1925 is presumably valid, and does not so plainly violate Section 7 of Article 9 of the Constitution as to justify us in holding the statute to be beyond the scope of legislative power."

Another very interesting case is that of *French vs. Millville*, 66 N. J. 392, affirmed 67 N. J. L. 349, in which case the defendant city had insured with plaintiff company and had given premium notes upon which this suit was brought. The defendant city pleaded, among other things, that paragraph 19 of Article 1 of the Constitution prohibited cities, etc., from loaning their credit to any corporation, and from becoming, directly or indirectly, the owners of any stock of any corporation. The Court said:

"The scheme of mutual insurance in such associations does not fasten upon the members any liability which municipal corporations may not with reasonable safety assume, for the limit of obligation is always fixed at the time the insurance is obtained, and is rarely enforced beyond what would be charged for insurance on the non-mutual plan.

"By giving its premium notes the city did not loan its credit to the company. Its promises were made for a consideration of value beneficial to itself, and like other assets of the company, they were purchased, not borrowed. Nor did the so-called membership of the insured render the city in any sense the owner of the stock or bonds which belonged to the company, or a holder of stock in the company, within the fair import of the constitutional prohibition."

McQuillan on Municipal Corporations (2 ed.), Section 2329, in discussing the constitutional prohibitions present in most of the State constitutions against donations, subscriptions, and the loaning of credit in aid of a company or association, states the law to be as follows:

"The fact that a municipality takes out insurance on its property by becoming a member of a mutual insurance company does not make it the owner of stock in a private company so as to violate the constitutional prohibition; and giving premium notes for payment of assessments to meet losses incurred by a mutual insurance company of which the municipality is a member does not constitute a loaning or credit to the company."

In Dillon on Municipal Corporations (5 ed.), Section 976n, it is said:

"An incident to the power to erect and maintain a city hall, school houses, and other public buildings, the municipality has the right to *contract for indemnity against fire by insuring* these buildings; and, having the power to insure, it may insure them in a corporation organized on the mutual plan under the laws of the State in which the city is located. Giving premium notes for losses incurred by such companies on other insurance is neither a loan of credit of the city, nor the owning of stock or bonds of the company in violation of constitutional provisions."

In Joyce on Insurance (2 ed.), Volume 1, page 708, we find the following:

"If the charter of a city empowers it to erect and maintain different public buildings, the city acquires, as incidental to the power thus granted the right to contract for indemnity against loss of such buildings by fire and such right can be exercised by insuring on the mutual plan."

The city does not *lend its credit* to an insurance company merely

because the city does not assume full and unqualified liability for the entire premium. The fact that the city makes a special contract whereby, under certain circumstances, it may be relieved from paying one-half of the premium, the so-called contingent premium, does not mean that the city is lending its credit to the company. On the contrary, if there is any lending of credit, then, as pointed out by the Supreme Court of Pennsylvania, it is by the company to the city.

It is a familiar rule of construction, universally applied, that every legislative act is presumed to be constitutional and will not be declared unconstitutional unless it is clearly so.

Correctly understood, nothing to the contrary was decided in the opinion of the Commission of Appeals in *City of Tyler vs. Texas Employers Insurance Association*, 288 S. W. 409, on rehearing, 294, S. W. 195. That case involved but a single question and that is clearly stated in the beginning sentence of the first opinion as follows:

“Are incorporated cities and towns in this State within the terms of our Workmen’s Compensation Act?”

Stated otherwise, the question was whether the word “corporation” used in the Workmen’s Compensation Act included *municipal* as well as *private* corporation.

Chief Justice Cureton, while First Assistant Attorney General, had held that the word “corporation” used in the Compensation Act of 1913 did not include municipal corporations. The legislature later, in 1917, re-enacted the Workman’s Compensation Act, thereby accepting and adopting Chief Justice Cureton’s construction of the same. This conclusively settled the only question involved in the City of Tyler case.

It is true that in the first opinion the Commission, after deciding this question of statutory construction, expressed its views on the constitutional question as to whether the legislature could have authorized municipal corporations to become subscribers to the association created by the Workmen’s Compensation Act. It expressly appears, however, that the consideration and decision of that question was unnecessary; and in the second opinion of the Commission, the opinion on rehearing, it was plainly stated that the only question really involved in the case was one of statutory construction and that what the Commission had said on the constitutional question had not been approved by the Supreme Court. We quote as follows from the opinion on rehearing:

“Of course the views expressed by us as to the grounds of our decision have not the force of the law, nor were they approved by the Supreme Court. It may be true that, in approving the judgment recommended by us, the Supreme Court was unwilling to assent to the proposition that the act would have been unconstitutional, had the legislature made it applicable to cities and towns, and yet also of the opinion of the legislature did not have such intention for the other reasons discussed by us.”

The commission itself having expressly declared that this question was not settled by its opinion, we do not feel warranted in treating the opinion as authoritatively settling the question. None of the authorities hereinbefore mentioned are referred to in the opinion of

the commission. And the opinion of the Court of Civil Appeals, in the same case, shows that the case was dealt with as one involving only the interpretation of the statute.

That counties, cities and school districts have been expressly authorized by statute to insure property in mutual or reciprocal companies cannot be disputed. The statute is clear and explicit in its terms and needs no construction and it is our opinion, and you are so advised, that the statute authorizing public and private corporations to hold policies of insurance in a mutual insurance company does not contravene the Constitution and is in all things valid. Accordingly, we answer the inquiry submitted in the affirmative.

The letter-opinion written by Honorable Grady Sturgeon, former Assistant Attorney General, under date of April 22, 1931, holding this act of the legislature, authorizing public and private corporations to insure property in mutual insurance companies, unconstitutional, is hereby withdrawn, and all opinions heretofore rendered on this same question in conflict with this opinion are hereby overruled.

Yours very truly,

EVERETT F. JOHNSON,
Assistant Attorney General.

Op. No. 2882.

OCCUPATION TAXES—LIFE INSURANCE COMPANIES—
STATUTES CONSTRUED.

The only securities in which foreign life insurance companies are permitted to invest their Texas reserve, which can be used by such companies for the purpose of reducing their occupation tax as imposed under Article 4769, Revised Civil Statutes, are those promissory notes or other obligations secured by mortgage, deed of trust, or other lien on Texas real estate exclusively, and the market value of such real estate must be double the amount loaned thereon, exclusive of buildings, unless such buildings are adequately insured as provided by said article.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, April 19, 1932.

*Honorable W. A. Tarver, Chairman Board of Insurance Commissioners,
Austin, Texas.*

DEAR SIR: This will acknowledge receipt of your recent favor to this department, wherein you request an opinion with reference to foreign life insurance companies being permitted to reduce their taxes by investment in Texas securities. The material portion of your letter reads as follows:

“A number of foreign life insurance companies operating in this State are reporting as Texas securities under Article 4766 and as tax reducing securities under Article 4769, first mortgage bonds of Texas public utilities and Texas railway companies. A common provision relating to the mortgaged property as security for such bonds is as follows:

‘ . . . all and singular the plants, rights, permits, franchises, privileges, easements and property, real, personal and mixed, now owned by the company or which may hereafter be acquired by it, together with the rents issues and profits thereof, excepting, however, and there are hereby ex-

pressly reserved from the lien and effect of this mortgage (a) all lamps and supplies, machinery, appliances, goods, wares, and other movable property now or at any time handled by the company for sale as merchandise or not in use or connected as fixtures with its own plants, and consumable supplies, and (b) all bonds, stocks and other securities now owned by or which may hereafter be owned by the company and which are not deposited under this mortgage, and (c) the last day of each of the demised terms created by any lease of property now leased to the company, and the last day of any demised term under each and every lease hereafter acquired by the company and under each and every renewal of any lease, the last day of each and every such demised term being hereby expressly reserved to and by the company.'

"It appears that while Texas real estate and improvements thereon constitute at least a part of the security for the bonds, certain other property, such as franchises, privileges, easements and property, both personal and mixed constitutes a part of the security for the bond issue.

"In some instances, the underlying security for the bond issue is property, both real and personal, located in other states as well as in the State of Texas.

"In some instances the company is incorporated under the laws of other states, but the property mortgaged is located in the State of Texas.

"Will you kindly give us your opinion as to the conditions under which such bonds comply, or otherwise, with Articles 4766 and 4769, respectively, above referred to?"

In answering your inquiry, it becomes necessary to construe portions of Chapter 4, Title 78, Revised Civil Statutes of 1925. It will be noted that Article 4765, Revised Civil Statutes, 1925, provides that every insurance company transacting or carrying on business in the State under a certificate of authority as required by law from the Insurance Commissioner, is compelled to invest at least seventy-five per cent of its "Texas Reserve" in Texas securities as defined by this chapter. This provision is applicable to both foreign and domestic corporations doing a life insurance business in the State of Texas.

Article 4766, Revised Civil Statutes of 1925, as amended by the Acts of the Forty-first Legislature, page 497, Chapter 237, defines the term "Texas securities", the pertinent portion of which we need to consider in this inquiry being as follows:

"The term 'Texas securities' as used in this chapter shall be held to include . . . promissory notes and other obligations, *the payment of which is secured by mortgage deed of trust or other valid lien upon un-encumbered real estate situated in this state, the title to which real estate is valid and the market value of which is double the amount loaned thereon, exclusive of buildings, unless such buildings are insured against fire and kept insured in some company authorized to transact business in this State, and the policy or policies transferred to the company taking such mortgage or lien . . . first mortgage bonds of any solvent corporation incorporated under the laws of this State, and doing business in this State and which has paid, out of its actual earnings, dividends of an average of at least five per cent per annum on the par value of all its par value stock outstanding, and on the sale value of all of its no-par value stock outstanding for a period of at least five years next preceding the date of such investment . . .*"

It will be noted from an observation of the above quoted article of the statutes that the same prescribes the kind and class of Texas securities in which a life insurance company transacting business in the State of Texas may invest its Texas reserve as required by the articles of the statute heretofore referred to. Said article does not attempt to impose, nor does it refer to, any taxes to be imposed upon

and to be paid by any life insurance company doing business in the State of Texas, whether foreign or domestic.

Article 4769, Revised Civil Statutes, 1925, does, by its terms, impose a graduated tax upon foreign insurance companies doing business in this State. It will also be observed by reading this article that certain reductions in the rate of taxation will be allowed such foreign companies, provided, and in the event, such companies make investments in certain Texas securities as prescribed therein. The pertinent portion of this particular statute is as follows:

“Each life insurance company not organized under the laws of this State transacting business in this State shall, annually, on or before the first day of March, make a report to the Commissioner . . . which shall show the gross amount of premiums collected during the year ending on December thirty-first preceding, from citizens of this State upon policies of insurance. Each such company shall pay annually an occupation tax equal to three per cent of such gross premium receipts. When the report of the investment in Texas securities, as defined by law, of any such companies as of December thirty-first of any year shall show that it has invested on said date as much as thirty per cent of its total Texas reserve as defined by law in promissory notes or other obligations secured by mortgage, deed of trust, or other lien on Texas real estate, the rate of occupation tax shall be reduced . . .”

We think that before a life insurance company can take advantage of the reduction allowed and permitted under the above statute it must clearly show that it has invested in the Texas securities prescribed therein, which allows such reduction.

It appears that, as a special inducement to insurance companies affected by this article to loan their money on the promissory notes or other obligations secured by a mortgage, deed of trust or other lien on Texas real estate, the Legislature has provided that such companies' taxes may be reduced, as set forth in said article, according to the amount of its reserve invested in such securities. It is obvious, in defining these securities under this particular article, that the Legislature uses almost the identical language as used under Article 4766, Revised Civil Statutes, with the exception that the same does not go as far in defining the class of real estate, nor the value of same, upon which such obligations or promissory notes may be issued and secured.

Therefore, under the well known rule of statutory construction permitted in construing statutes in *pari materi*, we may look to Article 4766 in order to ascertain the exact intention of the Legislature with reference to the expression “in promissory notes or other obligations secured by mortgage, deed of trust or other lien on Texas real estate”, as used in Article 4769, Revised Civil Statutes of Texas, which imposes and fixes the tax here under consideration. In looking to this article we think the legislative intent is clear to the effect that the term “promissory notes or other obligations secured by mortgage, deed of trust or other lien on Texas real estate” means that such obligations shall be secured by valid lien wholly upon unencumbered real estate situated in this State, the market value of which is double the amount loaned thereon exclusive of the buildings, unless such buildings are insured and kept insured as required by this article.

The reduction in taxes, as permitted under Article 4769, above referred to, is in the nature of an exemption or exception and, therefore, must be strictly construed, and any corporation claiming to come within such exception or exemption must assume the burden of showing that it comes clearly within the terms of same. See, in this connection, *Gulf States Utilities Company vs. State*, 46 S. W. (2nd) 1018; *City of San Antonio vs. Y. M. C. A.* 285 S. W. 844; *Houston vs. Scottish Rite Association*, 111 Texas 191, 230 S. W. 978; *Masonic Temple vs. Amarillo*, 14 S. W. (2nd) 128; *Morris vs. Lone Star Chapter*, 68 Texas, 702.

Looking to Article 4769 further for the purpose of ascertaining the true legislative intent with reference to permitting the reduction of taxes, we think the well known rule of statutory construction known as "expressio unius est exclusio alterius" is applicable. In applying this well known doctrine we find that the Legislature has specifically said that in the event such report as required to be filed by such foreign corporation "shall show that it has invested on said date as much as thirty per cent of its total Texas reserve as defined by law in promissory notes or other obligations secured by mortgage, deed of trust, or other lien on Texas real estate, the rate of occupation tax shall be reduced. . . .".

Your attention is specifically directed to the fact that the article of the statutes imposing the tax and providing for the reduction in same does not mention any other class of securities other than the ones above referred to. It is presumed that the Legislature is familiar with all well settled rules of statutory construction and had the same in mind at the time of enacting the law. Therefore, we think it clear, in applying this rule, that if the Legislature had intended to permit such life insurance companies to reduce their taxes by investment of their reserve in other securities in which they are permitted by law, it would have specifically enumerated the same in this statute.

We are of the opinion, and you are so advised, that, under our construction of the statute, you are only to accept the securities of such life insurance companies for tax reducing purposes as those secured by mortgage, deed of trust or other valid lien upon unencumbered real estate situated in this State, the market value of which must be double the amount loaned thereon exclusive of buildings, unless such building or buildings are insured and kept insured in some **company** authorized to do business in Texas, and the policy or policies are transferred to and held by such insurance company making the loan.

We do not wish to be understood as holding that such securities may not be additionally secured by other property than the real estate above mentioned, as for instance the tangible and intangible personal property, and the rights pertaining thereto, commonly owned, used and enjoyed by public utility and railroad corporations such as the ones here under consideration, for we do not think this additional security objectionable but, of course, it is not necessary. In other words, you should not be concerned with the same arriving at your conclusion as to whether or not such securities are acceptable for tax reducing purposes. The primary question for you to determine is:

Are such securities secured by unencumbered real estate situated in Texas as provided in said statute as heretofore mentioned?

As we view the situation, each case presents a question of fact for you to determine and we think you are charged with the duty of ascertaining whether or not such securities are secured in the manner as set forth above before you should accept the same for tax reducing purposes and you are accordingly so advised.

Trusting we have answered your questions fully, we are

Very truly yours,

SIDNEY BENBOW,
Assistant Attorney General.

Op. No. 2888.

INSURANCE—MUTUAL AID ASSOCIATIONS—STATUTORY BOND—
ART. 4875a-5, SEC. 5, R. C. S.

Statutory bond, prescribed by Article 4875a-5, Section 5, Revised Civil Statutes of Texas (comprising a part of Chapter 274, page 563, Acts 1929, 41st Legislature), requiring secretary or other officer of local mutual aid associations charged with the duty of handling the funds of the association to make and file bond with a surety company covering faithful performance of duty, is construed to be a fidelity bond and not in anywise a depository bond.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, August 2, 1932.

*Hon. W. A. Tarver, Chairman, Board of Insurance Commissioners,
and Life Insurance Commissioner, Austin, Texas.*

DEAR SIR: Your letter of the 27th ultimo, requesting an opinion of the Attorney General with reference to the assumed liability of surety companies in the execution of fidelity bonds as required by Article 4875a-5, Section 5, Revised Civil Statutes of Texas, (comprising a part of Chapter 274, page 563, Acts 1929, Forty-first Legislature), has been received.

As a matter of convenience, we quote a part of your letter, as follows:

"The Secretary-Treasurers of the local mutual aid associations in this State are experiencing a great deal of difficulty in meeting the requirements of the statutes as set out in Subsection 5, Section 5, of Article 4875a, Acts of the Forty-first Legislature, wherein 'the officer of the association designated to have charge of the funds of the association shall make and file a bond with a surety company, satisfactory to the Board, as surety in the sum of not less than \$5,000.00, payable to the Board of Insurance Commissioners of Texas and which shall at all times be equal to the amount of the mortuary fund on hand, which said bond shall be conditioned upon the faithful performance of the duties of the said officer and of the care and custody of the funds in his hands and the disbursement thereof according to the laws of the State and constitution and by-laws of the association.'

"We are informed by various representatives of the surety companies in this State that the surety companies regard this as a binding financial guarantee rather than a fidelity surety bond and believe themselves to be liable thereunder for funds regularly deposited in a state or national

bank in case the bank should fail. So far as we have been informed there has been no effort on the part of the State to construe this bond as a depository bond.

"We should appreciate a ruling from your department as to the liability of the surety companies governing the question involved."

We understand that the condition now exists whereby many local mutual aid associations are unable to make a bond with a surety company in compliance with the provisions of Article 4875a-5, Section 5, Revised Civil Statutes of Texas, this condition having been brought about by reason of the fact that surety companies are unwilling to become sureties on such bonds, contending that under the conditions of the statutes they (sureties) would be liable for funds belonging to the association placed in a bank by the officer designated to have charge of the funds which bank later becomes insolvent, as such acts would be in violation of the terms of said bond. In other words, the surety companies have taken the position and contend that this bond is not only a *fidelity bond* covering the faithful performance of the duties of the secretary or other officer designated to handle the funds of the association but is also considered a depository bond. The statutory bond in question reads:

"* * * Thereupon the bond shall require and the officer of the association designated to have charge of the funds of the association shall make and file a bond with a surety company satisfactory to the Board, as surety, in the sum of not less than five thousand dollars (\$5,000.00) payable to the Board of Insurance Commissioners of Texas, and which shall at all times be equal to the amount of the mortuary fund on hand, *which said bond shall be conditioned upon the faithful performance of the duties of said officer and of the care and custody of the funds in his hands and the disbursements thereof according to the laws of the State and the constitution and by-laws of the association * * **"

The bond quoted above, we take it, is for the sole purpose of securing the faithful performance of the duties of the secretary or other officer designated to have charge of the funds of the association as prescribed by the statutes, constitution and by-laws of the association. Those duties are set out in the statutes in plain and express terms. For instance, the statute requires that "all funds collected belonging to the association shall be deposited within five days in a state or national bank"; and in this connection it might be well to note that the statute specifically states "the constitution and by-laws of such association shall not violate any provisions of this law but shall be in harmony herewith."

The provisions of the statute above quoted, requiring all funds to be deposited in a state or national bank within five days, is mandatory and must be strictly complied with. In this particular instance the legislature has seen fit to specifically direct the proceedings with reference to funds coming into the hands of the secretary, and we believe the argument unsound and the contention unreasonable, where the legislature has in express terms demanded that the funds of the association be deposited in such manner, to say that the officer complying with the provisions of the statutes or his bondsmen, in the absence of bad faith or negligence on the part of the officer in selecting the depository, are to be subjected to litigation or penalized therefor

in the event of loss where the delegated duties are being performed. In other words, an officer handling the funds of an association in making a deposit in a state or national bank within five days after receipt of the funds is carrying out the legislative intent and performs the duties imposed upon him by law.

To the common understanding the giving of a bond implies security, as in the case of fiduciaries and others charged with some public or private duty. It is an obligation or contract whereby one person binds himself to another to perform certain conditions therein set out, and the surety on said bond binds itself in the event the obligor fails to comply with or perform those conditions set forth in the bond.

We shall now proceed to analyze the statutory bond required of the officer handling funds of local mutual aids and the conditions which that bond purports to cover. It is to be noted that said bond is to be conditioned:

- (1st) Upon the faithful performance of the duties of said officer;
- (2nd) The care and custody of the funds in his hands;
- (3rd) The disbursements thereof according to the laws of the State and the constitution and by-laws of the association.

It is the foregoing conditions that the Board of Insurance Commissioners and the Attorney General of this State must look to in determining whether or not an officer handling the funds of a local mutual aid association has violated the terms of his bond.

The first condition of the bond covers the faithful performance of the duties of said officer. Now, the duties of said officer, as heretofore shown, are prescribed by the laws of the State, the constitution and by-laws of the association. Bear in mind that the constitution and by-laws of the association shall never at any time violate or be in conflict with the provisions of the law. The depositing of funds in a state or national bank is one of the duties prescribed by the statute, and we cannot concur in the purported opinion of the surety companies that if an officer performs those duties he is to be subjected to liability therefor in the event of the failure of the bank. In other words, the officer designated to have charge of the funds of the association is not the absolute insurer of such funds. To contend that in the absence of bad faith or negligence on the part of the officer in selecting the depository it would be a breach of the faithful performance of duty to place the funds of an association in a bank which later becomes insolvent would be to contend that the officer charged with the duty of handling such funds is the absolute insurer and would have the effect of indemnifying the members of the association against all losses. In our opinion, such proposition is unsound and disregards the intent and meaning of the conditions of the bond.

The second and third conditions, as prescribed by the statute and hereinbefore set out, can be discussed together. They deal with the care and custody of the funds in the hands of the officer and the disbursements thereof according to the laws of the State, constitution and by-laws of the association. Since the officer's duties in these connections are commonly understood and not relevant to the question

being passed upon in this opinion, we do not deem it necessary to discuss them at length.

The surety companies have in the past executed a straight fidelity bond for the officer of the association, which we understand has been acceptable to the Board of Insurance Commissioners. We believe such a bond meets the requirements of the statutes, provided some reference is made to show that it purports to comply with Article 4875a-5, Section 5, Revised Civil Statutes of Texas. The courts of this State have held that a statute upon which a bond rests and to which it relates becomes a part of the bond to the same extent as though incorporated in the instrument. In the case of *Globe Indemnity Company vs. Barnes, et al*, 288 S. W., 122, the court held:

“It is well settled that where a bond is executed with the intention upon the part of all parties to comply with the requirements of a statute, the terms of such statute will become a part of such obligation, by incorporation as it were, even though the bond itself otherwise be silent as to the statutory obligations.” Citing *U. S. Fidelity & Guaranty Co. vs. Henderson County*, 276 S. W., 203; *Smith vs Fidelity & Guaranty Co.*, 280 S. W., 767.

The holding in the case of *Globe Indemnity vs. Barnes*, supra, is to the effect that all persons are presumed to know the law and to contract with reference thereto.

It is our opinion, and you are so advised, that the bond required by Article 4875a-5, Section 5, Revised Civil Statutes of Texas, is in the true sense of the word a fidelity bond and, in the absence of bad faith or negligence on the part of the officer in selecting the depository, such bond would not cover funds on deposit in a failed or insolvent bank.

Yours very truly,

EVERETT F. JOHNSON,
Assistant Attorney General.

Op. No. 2893.

RECIPROCAL INSURANCE—POWER OF RECIPROCAL TO PAY DIVIDENDS UNDER COMPENSATION LAW

A reciprocal insurance company writing workmen's compensation insurance and liability automobile insurance has the power to pay dividends to its subscribers upon facts stated in inquiry.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, August, 19, 1932.

Honorable W. S. Pope, Casualty Insurance Commissioner, Capitol, Austin, Texas.

DEAR SIR: This will acknowledge receipt of your recent communication in which you ask for a departmental opinion upon certain phases of the reciprocal insurance law, the pertinent part of your inquiry reading as follows:

“Is the Board of Insurance Commissioners authorized under Article 4914, R. S. 1925, to approve dividends to subscribers under the Workmen's

Compensation Act when the subscriber is carrying his insurance in a reciprocal or inter-insurance exchange?

"Is the Board of Insurance Commissioners authorized by law, under Section 6, Automobile Insurance Law, Chapter 253, page 373, Regular Session 40th Legislature, to approve dividends to automobile insurance policyholders carrying insurance on their motor vehicles with reciprocal or inter-insurance exchange carriers?"

"The Board, in attempting to prescribe what are adequate reserves, has found that a minimum sum equal to 65% of the earned premiums for the last three years (less the amount of losses actually paid) must be set up in workmen's compensation insurance to pay the injured employees of the policyholders. To be a reserve for this purpose, the funds of the various subscribers or policyholders *must be a joint fund*. This reserve should be held in addition to any or all unearned premiums that the carrier may have collected. Likewise, minimum proportions of the earned premium on all automobile insurance coverages must be set up and held as a joint fund for reserves out of which to pay the losses under the various insurance coverages.

"An examination of the powers of attorney signed by the subscribers of reciprocal insurance carriers shows a provision similar to that in paragraph 3 of the Subscriber's Agreement marked Exhibit 'A' and attached hereto, in which it is recited that subscribers shall have *no joint funds, capital or stock* 'Our attorneys-in-fact shall not bind us for the obligations of any other subscriber, but for ourselves alone.' Contrary provisions would probably make of this non-incorporated insurance carrier a partnership. Paragraph 1 of said Agreement shows that the reciprocal therein described is neither, nor does it purport to be, a separate entity of any kind, but 'a place.'

"The Board is confronted by this apparent inconsistency between the application for dividends of the reciprocal carriers and the powers of attorney executed by these subscribers who own the funds. The application for dividends treats the funds as if they were joint. The subscriber's agreement or power of attorney expressly limits and denies that they are joint funds."

"The Board of Insurance Commissioners has for many years permitted reciprocal insurance associations operating under similar contracts and powers of attorney as the ones here under consideration to pay dividends or return unused portions of deposits to the subscribers in such associations."

For the sake of brevity, we shall not attempt to set forth in full the power of attorney attached to your communication, but shall only set forth those portions which we think pertinent to the inquiry under consideration, the same reading as follows:

"Our attorneys in fact may exchange insurance for us with other subscribers at Consolidated Underwriters, and have full power to do or perform every act we ourselves could do in relation to any such insurance, including the execution and issuance of contracts relating thereto and the reinsurance thereof * * * they are specifically authorized to do any and all things necessary to effect compliance with the laws of any state * * *."

"The subscribers shall have *no joint funds, capital or stock*. Our attorneys-in-fact shall not bind us for the obligation of any other subscriber, but for ourselves alone.

"Our attorneys-in-fact shall pay out of our funds our proportion of the cost of securing, issuing and exchanging insurance, including all claims or demands as adjusted, contested, compromised, or reduced to judgment, but our liability in excess of the premiums charged in accordance with the insurance contracts issued to us shall not exceed our average annual premiums.

"In case of disagreement as to any additional or *return premium* due from or to us on contracts written on a payroll basis, we hereby appoint the Advisory Committee at Consolidated Underwriters, as it may then be

constituted, to act as arbitrators, and a decision of a majority of such committee shall be binding on us and on our attorneys-in-facts."

We have studied carefully the standard form policy submitted by you to this department, and in order to avoid unnecessarily lengthening this opinion, we are only copying parts thereof which we term pertinent to the question here under consideration, the same reading as follows:

"A. * * * At the end of the contract period the actual amount of remuneration earned by employees during such period shall be exhibited to the carrier, as provided in Condition 'C' hereof, and the earned deposit or deposits adjusted in accordance therewith at the rates and under the conditions herein specified. If the earned deposit or deposits thus computed are greater than the initial or original deposit or deposits, this subscriber shall immediately deposit the additional amount with the carrier, if less, the carrier shall return to the subscriber the unearned portion, but in any event, shall collect the amount as designated as the minimum deposit stated in the declarations. All deposits provided by this contract or by any endorsement thereto shall participate fully, whether any such Workmen's Compensation Law or any part of such is now or shall hereafter be declared invalid or unconstitutional."

"It is agreed that all of the provisions of each Workmen's Compensation Law covered hereby shall be and remain a part of this contract as fully and completely as if written herein, so far as they apply to compensation or other benefits for any personal injury or death covered by this contract, while this contract shall remain in force."

This form of insurance known as "reciprocal" or "inter-insurance" may be defined as that system of insurance whereby several individuals, partnerships and corporations underwrite each other's risk against loss by fire or other hazards through an agent representing all subscribers, generally known as an attorney-in-fact, under an agreement whereby each underwriter or subscriber acts separately and severally and not jointly with each other such subscriber. All policyholders are insurers as well as insured. This form of insurance is very analogous to mutual insurance except it does not have the corporate entity of a mutual insurance company. 58 Central Law Journal, p. 323; Cooley's Briefs on Insurance, 2nd Ed., Vol. 1, p. 70-71; Sergeant vs. Goldsmith Dry Goods Company, 110 Tex. 482, 221 S. W. 259, 10 A. L. R. 742; Thomas Canning Company vs. Cannery Exchange, 219 Mich. 214, 189 N. W. 214.

This particular kind of insurance is probably one of the oldest forms of insurance known to mankind. It unquestionably grew out of the principle of contribution and general average which is found in the law of the ancient Rhodiens. Under this law if a ship, freight or cargo were sacrificed to save the others, all had to contribute their proportionate share of the risk or loss. This division of loss soon led to and suggested a provisional or conditional division of risk or loss, first among those engaged in the same enterprise, and later among associations of ship-owners and shipping merchants. See 16 Am. Eng. Enc. of Law, 2nd Edition, page 839. Yale Readings on Insurance by Zartman and Price, p. 62.

This State has expressly recognized this form of insurance in that it is specifically provided by statutory law that individuals, partnerships and corporations of this State may exchange reciprocal or inter-

insurance contracts with each other or with individuals, partnerships and corporations of other states and countries, wherein they may indemnify each other against any loss which may be insured against under any other provision of the laws of this State with the exception of life insurance. See Articles 5024-5033, inclusive, Revised Civil Statutes of Texas, 1925.

The Legislature has again, subsequent to the passage of the above statute, expressed its recognition of this form of insurance by expressly providing that such associations may issue compensation contracts of insurance and automobile indemnity insurance. See Article 8309, Sec. 2, Revised Civil Statutes of 1925; also Acts, Regular Session, 40th Legislature, Chapter 253, page 373.

The above discussion has been confined principally to the history of reciprocal or inter-insurance associations solely for the purpose of giving one a better understanding as to the nature of such insurance and the formation of such associations. Bearing in mind the peculiar status of these associations, and the members thereof with relation to each other, we shall now proceed in an endeavor to answer your questions, both of which, we think, can be treated jointly for the purpose of your inquiry.

It must be admitted, from an observation of the terms of the power of attorney and policy submitted herewith, that the subscribers to this association have expressed an intention that in so far as they are individually concerned, their deposit or deposits are to be treated severally and not jointly; that is, until the attorney-in-fact has created a liability as against the members of the association as authorized by his power of attorney, or until a claim has arisen as against the association the deposit or deposits paid to the attorneys-in-fact are to remain the individual property of the respective subscribers. We think, however, from the terms of the contract, and the policy here under consideration, the intention of the subscribers is clear in so far as the obligations which are created by the attorney-in-fact within the scope of his authority are concerned, and in so far as the obligations of third persons are concerned as against the association and the subscribers thereof. The subscribers of such associations as the one here under consideration have treated such deposits as joint funds because, as will be noted from the power of attorney and policy issued in pursuance thereof, each subscriber has agreed that the attorney-in-fact will have the full power to use each subscriber's deposit, or a proportionate part thereof, as may be determined necessary, for the purpose of paying all liabilities of the subscribers or the association created by the attorney-in-fact under the authority vested in him by virtue of the power of attorney. We are also of the opinion that when such association as the one here under consideration takes advantage of, complies with, and is authorized to write compensation insurance that it subjects such deposit or deposits to the control and supervision of the Board of Insurance Commissioners and that such deposit or deposits, as a matter of law, must be treated by the Board of Insurance Commissioners as a joint deposit. Especially is this true with reference to the payment of compensation claims and in establishing and maintaining adequate reserves as

provided by law. See, in this connection, Articles 4911, 4914, 8306, Sec. 23, Revised Civil Statutes of Texas, 1925.

From an observation of these statutes we think that the Legislature has clearly expressed its intention that such deposit or deposits of subscribers in associations like the one in question are to be treated as joint funds by the Board of Insurance Commissioners for the purpose hereinabove stated. To hold that such deposit or deposits are to be treated severally by the Board of Insurance Commissioners for the purpose of establishing and maintaining adequate reserves would be placing an impractical construction on same because it would be impossible for the Board of Insurance Commissioners to administer the same in any such manner.

In the case of *Sargent vs. Goldsmith Dry Goods Co.*, 221, S. W. 259, the Supreme Court of this State was called upon to construe a similar power of attorney executed by subscribers in the Commercial Underwriters, a reciprocal association, and also the nature of the funds constituting the deposit or deposits of the subscribers in this association. The Court held that these deposits constituted a common or joint fund for the purpose of discharging the obligations and liabilities created by the attorney in fact as to third persons in behalf of the association. In the course of the opinion Judge Phillips, speaking for the Court, used the following language:

“The application of each member and policy issued show that the plan adopted for the payment of all losses under policies, and expenses in the conduct of the association’s affairs, was the creation of a fund to be derived from the payment by each member as a policyholder, into the hands of the manager as a trustee, of an amount not exceeding as a maximum for each member that of the stated premium of his own policy or policies. The contemplation was, as is clearly evident, that the experience of the concern as to losses would not require the payment by each member of the full amount of the stated premium and, therefore, the result would be *the creation of a common fund sufficient to liquidate all losses and at the same time protection for each member for less than the ordinary cost of insurance.* Accordingly only a portion of any member’s stated premium was required to be originally paid by him. This was called a deposit. *The sum of the deposits made up the fund for the payment of losses.* The deposit of each member was placed to his credit. If not absorbed for the payment of losses or expenses, it or any portion unexpended for these purposes was to be returned to him upon his ceasing to be a member or policyholder. In this sense it remained his individual property impressed with what was in the nature of a trust.”

We have seen, from an observation of the above statutes, that the Legislature has authorized reciprocal or inter-insurance associations to write any and all forms of insurance in the State of Texas including compensation and automobile liability insurance with the exception of life insurance. The Legislature has also authorized the execution and exchange of such insurance contracts. It has not enacted any prohibitory statutes, in so far as we have been able to ascertain, wherein such associations have been denied the right to declare dividends or return unused portions of the deposit or deposits to the subscribers depositing the same with the attorney-in-fact. It must be admitted by every one who is conversant with reciprocal insurance that it has been the practice of such associations from time immemorial to declare dividends or return unused portions of deposits to the

subscribers or members of such associations. Therefore, in the absence of any such prohibitory statute we are clearly of the opinion that such associations would have the inherent power to declare such dividends or return such unused portions of the deposits to said subscribers.

We think the Legislature of this State, in many instances, has recognized that such associations have this power by express statutes with reference to the payment of said dividends or return of said deposits to such subscribers. In this connection we first call your attention to Article 5030, Revised Civil Statutes of Texas, 1925, the pertinent portion of which reads as follows:

“Such attorney (speaking of the attorney-in-fact) shall make an annual report to the Commissioner . . . showing the financial condition of the affairs at the office where such contracts are issued . . . and shall furnish such additional information and reports as may be required to show the total premiums or deposits collected, the total losses paid, *the total amounts returned to subscribers*, and the amounts retained for expenses.”

We think the Legislature, by requiring the management of such associations to show “the total amounts returned to subscribers” in such manager’s annual report, clearly shows legislative recognition that such associations have the inherent power to declare dividends or return to subscribers unused portions of their respective deposits placed with their attorney-in-fact. What amounts, or what sums of money, could the Legislature have had in mind to be returned to the subscribers other than the unused portion of such subscribers deposits and any dividend accumulations earned thereon by reason of investing the same by the management?

We think the Legislature again recognized the power of a reciprocal or inter-insurance company to issue participating policies and pay dividends thereunder in the language used in Article 4914, Revised Civil Statutes of Texas, 1925, which reads as follows:

“Nothing in this chapter shall be construed to prohibit the operation hereunder of any stock company, mutual company, *reciprocal or inter-insurance exchange*, or Lloyds association, to prohibit any stock company, mutual company, *reciprocal or inter-insurance exchange*, or Lloyds association, *issuing participating policies*, provided no dividend to subscribers under the Workmen’s Compensation Act shall take effect until the same has been approved by the Commissioner. No such dividends shall be approved until adequate reserve has been provided, said reserve to be computed on the same basis for all classes of companies or associations operating under this chapter as prescribed under the insurance laws of the State of Texas.”

As will be observed, the above statute constitutes a portion of what is known as the Workmen’s Compensation Law of the State of Texas. The Legislature, evidently, having in mind that there existed no statute prohibiting a reciprocal or inter-insurance exchange issuing a participating policy was very careful in this statute to expressly state that the same was not to be construed as prohibiting the issuance of such policies by this class of insurance associations, but before such dividends could be declared on such policies the same must be approved by the Board of Insurance Commissioners, and as a further restriction on the payment of such dividends the Legislature expressly provided that adequate reserves must be maintained and that the said

reserves must be computed on the same basis for all classes of companies or associations doing business under the workmen's compensation law and that such reserves must be computed as prescribed under the insurance laws of the State of Texas. To hold that a reciprocal or inter-insurance exchange does not have the power to declare a dividend under the workmen's compensation law of the State of Texas would render the language of this statute meaningless.

We again find the Legislature recognizing powers of a reciprocal or inter-insurance exchange to declare dividends in the passage of what was known as the Automobile Liability Insurance Law enacted at the Regular Session of the 40th Legislature of Texas, page 373, Session Laws, the pertinent portions of which reads as follows:

"Sec. 1. Every insurance company, corporation, inter-insurance exchange, mutual, reciprocal association, Lloyds or other insurer writing automobile insurance in this State hereinafter called the insurer shall file with the Commissioner of Insurance . . . its classification and risks and premium rates. . . ."

And again we find the following language in Section 6:

"Nothing in this act shall be construed to prohibit the operation hereunder of any stock company, mutual company, *reciprocal or inter-insurance exchange*, or Lloyds association, or to prohibit any stock company, mutual company, *reciprocal or inter-insurance exchange*, or Lloyds association issuing *participating policies*; provided no distribution of profit or dividends to insured shall take effect or be paid until the same shall have been approved by the Commissioner; and provided further that no such distribution shall be approved until adequate reserves shall have been provided, such reserves to be computed on the same basis for all classes of insurers operating under this act."

We do not think it can be successfully denied that the Legislature has unequivocally, by the language used in this act, recognized the inherent power of a reciprocal or inter-insurance exchange issuing participating policies which, of course, would carry with such policies the power to pay dividends thereunder or return to the subscribers in such associations the unused portion of any deposit or deposits which such subscribers may have placed with their attorney-in-fact. Realizing that such associations had this inherent power, the Legislature was very careful not to prohibit the same by the enactment of this law. Any other construction than the one here placed upon this act we think would render the language used therein absolutely meaningless.

As heretofore stated, we think such associations as the one here under consideration have the inherent common law power to pay dividends or return unused portions of deposits to the subscribers in such associations, and in the absence of any special prohibitory statute such power would exist in Texas where the common law is in force, but in addition to this power, which we think has never been denied such associations by the Legislature of this State, we are of the opinion that the Legislature has impliedly authorized the payment of such dividends or the return of such unused portion of the subscribers deposits in the statutes above referred to, and that such intention is clearly and unequivocally expressed by the language used therein. But, if there be any doubt, the long and continued construction placed

upon the power of such associations to declare such dividends by the Department of Insurance is entitled to great weight, for it is a well established doctrine that the interpretation placed upon any statute by the executive department for a long number of years charged with the enforcement thereof in case of ambiguity or uncertainty will be followed by the courts unless it clearly appears that such construction placed upon same by the head of such department be clearly erroneous. See in this connection *Harris vs. Hammond*, 203 S. W. 445; *Railway Company vs. Taylor*, 81 Texas 602; *Associated Retail Credit Men vs. Jane Y. McCallum*, 41 S. W. (2nd) 45; *United States vs. Graham*, 110 U. S. 219; *Houghton vs. Payne*, 194 U. S. 88; *United States vs. Heely*, 160 U. S. 136; *United States vs. Falks Bros.*, 204 U. S. 143; *Komado & Company vs. United States*, 215 U. S. 249.

The above rule has been very ably expressed in the case of *Harris County vs. Hammond*, supra, by Judge Pleasants, speaking for the Court, in the following language:

“It is a well recognized rule of decision in this State that when the construction of a statute is doubtful the construction given it by the officers of the State expressly charged with the duty of its enforcement is entitled to great weight, and unless the court is clearly of the opinion that such construction is erroneous, it should not give the statute a different meaning.” (Citing *Railway Co., vs. State*, 81 Texas, 802; *Stevens vs. Campbell*, 26 Tex. (Civ. App.) 213, 63 S. W. 161.

As heretofore stated in this opinion, we are clearly of the view that a reciprocal or an inter-insurance exchange such as the one here under consideration, has the inherent power to declare dividends, and that the Legislature has conferred upon the Board of Insurance Commissioners the power to consider the deposit or deposits of said subscribers as joint funds for the purpose of enforcing the statutes with reference to such associations maintaining adequate reserves, and also for the purpose of approving dividends which may be paid or returned to the subscribers by such associations.

We are also of the view, for the reasons hereinabove stated, that the power of attorney and policy here in question do not contain any language which is inconsistent with the power conferred upon the Board of Insurance Commissioners just above mentioned, and you are accordingly so advised.

Trusting we have answered your questions fully, we are

Very truly yours,

SIDNEY BENBOW,

Assistant Attorney General.

Op No. 2894.

INSURANCE—LIFE INSURANCE—FOREIGN LIFE INSURANCE COMPANIES—NOMINAL OR NO-PAR VALUES STOCK—TRANSACTION BUSINESS IN TEXAS.

1. Where a foreign life insurance company has been authorized by the Insurance Department to do business in this State and has built up a business under the assumption that it has the legal right to do business in this state, having all of its capital fully paid, \$100,000.00 of said capital

stock being represented by par value shares, the remainder of which is represented by non-par value shares, the Insurance Department would not be authorized to refuse a permit to such company to continue to do business in this State if, in all other respects, such company is qualified to do business under the laws of this State.

2. A foreign corporation cannot do an intrastate business in a State except and unless such State grants its consent. It may exclude them arbitrarily, or impose such conditions as it deems expedient and necessary, except such state may not exact, as a condition of such foreign corporation engaging in business within its limits, that it give up its rights granted and secured to it by the Constitution of the United States.

3. A state cannot exact of a foreign corporation that it give up its constitutional right to remove suits brought against it from the state court to the federal court, if it so desires, as a condition to such foreign corporation engaging in intrastate business in such state.

4. The business of conducting a life insurance business has been fully recognized by the courts to be one affected with a public interest and, by reason thereof, is a proper subject for the exercise of the police power of the state.

5. Under the well established principles of comity, a corporation created by one state or nation may be permitted to enter other states and to exercise all lawful powers conferred upon it by the state of its creation, except and unless its operations are against the local public policy.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, May 13, 1932.

Honorable W. A. Tarver, Chairman Board of Insurance Commissioners, Austin, Texas.

DEAR SIR: This will acknowledge receipt of your recent favor to this department, wherein you request an opinion based upon the following question:

"Should a foreign life insurance company, otherwise entitled to do business in this State, be denied a certificate of authority solely for the reason it has issued and outstanding nominal or no-par value stock?"

From the information furnished this department by you in submitting your question, the same reflects the facts to be as follows:

The corporation involved is a corporation duly incorporated under and by virtue of the laws of the State of Colorado, with full authority to write insurance on the lives of those with whom it contracts for such purpose. Its stock structure consists of 2,000 shares of the par value of \$50.00 each, and 18,000 shares with nominal or no par value. All of its shares of stock have been subscribed, fully paid for, and outstanding.

This corporation entered Texas for the purpose of doing business therein in 1929, and secured a certificate of authority to transact such business from the Insurance Commissioner of the State of Texas. It has continually done business up to this time and no question has been raised by the Insurance Commissioner or any other authorized public official of the State of Texas due to the fact that it has issued and outstanding stock of non par value.

The facts further reflects that the Insurance Commissioner has issued a certificate of authority to at least one other foreign corporation having no par value stock subsequent to the time of issuing the certificate to the former corporation in 1929. Both of said corporations have written considerable business in the State and desire to continue to do so, provided the Commissioner of Insurance will issue a certificate of authority.

It must be conceded that a foreign corporation can not do an in-

trastate business in another state except and unless such other state grants it its consent, and that such state may exclude it arbitrarily, or impose such conditions as it deems expedient and necessary, upon its engaging in business within its jurisdiction. *Bank of Augusta vs. Earle*, 13 Pet. 519, 10 L. Ed. 274; *Paul vs. Virginia*, 8 Wall. 168; 19 L. Ed. 337; *Ducat vs. Chicago*, 10 Wall. 410, 19 L. Ed. 972; *Horn Silver Company vs. New York*, 143 U. S. 305; 12 S. Ct. 403, 36 L. Ed. 164. This general rule, however, is subject to certain exception and qualification as has been reflected by recent decisions of the Supreme Court of the United States. That qualification is, that a State may not exact as a condition of such foreign corporation engaging in business within its limits, that it give up its rights granted and secured to it by the Constitution of the United States. *Sioux Company vs. Cope*, 236 U. S. 197; *Looney vs. Crane Company*, 235 U. S. 178; *Terrell vs. Burke Construction Company*, 257 U. S. 529, 42 Sup. Ct. 188; 66 L. Ed. 352.

The exception or qualification above stated has been very plainly illustrated in the last case cited, in which a provision of the State law revoking and annulling the license of a foreign corporation for exercising its constitutional right to remove suits brought against it from the State court to the Federal court was held void. See also in this connection *Hanover Fire Insurance Company vs. Carr*, 272 U. S. 494; 47 Sup. Ct. Rep. 179; *Western Union Telegraph Company vs. Kansas*, 216 U. S. 1; 30 Sup. Ct. 190; *St. Louis Cotton Company vs. Arkansas*, 260 U. S. 346, 43 Sup. Ct. 125; *Southern Railway Company vs. Green*, 216 U. S. 400; 30 Sup. Ct. 287, 54 L. Ed. 536; *Airway Corporation vs. Day*, 266 U. S. 71; 45 Sup. Ct. 12, 69 L. Ed. 169.

The business of conducting an insurance business has been fully recognized by the courts to be one affected with a public interest and, by reason thereof, is a proper subject for the exercise of the police power of a state. Therefore, a state has full power to pass all proper and necessary regulatory measures with reference to the conduct of such business. *German Alliance Insurance Company vs. Superintendent of Insurance*, 233 U. S. 389; *Jefferson County Title Company vs. Tarver*, 29 S. W. (2d) 316.

Under the well established principles of comity, a corporation created by one state or nation may be permitted to enter other states and to there exercise all lawful powers conferred upon it by the state of its creation, except and unless its operations are against the local public policy. 14-a C. J. 1217; *Lytle vs. Custead*, 23 S. W. 451; *Sovereign Camp of W. O. W. vs. Fraley*, 59 S. W. 905, 94 Texas 200; *Lass vs. Ohio*, 92 Texas 651, 51 S. W. 502.

This doctrine of comity must be presumed to exist, and does exist, until a state expresses an intention to the contrary in some affirmative way. It may be expressed by direct legislative enactments on the particular subject involved or by the general public policy deduced from the general course of its legislation or the adjudications of its courts of last resort. *Scharbrauer vs. Lampasas County*, 235 S. W. 533; *American Christian Union vs. Yount*, 101 U. S. 356, 25 L. Ed. 888; *Mannington vs. Hocking Valley Ry. Co.*, 183 Fed. 133; *Clark*

vs. Memphis Street Railway Company, 123 Tenn. 232, 130 S. W. 751.

The doctrine of comity has been set forth in very clear language by the Commission of Appeals of the State of Texas in the case of Scharbrauer vs. Lampasas County, supra, in an opinion written by Judge Taylor, wherein he uses the following language:

"It is under principles of comity that a corporation created in one state is permitted to secure permit to transact business in other states. It is pointed out in Vol. 14a, Corpus Juris, 3928, that the rules of comity are subject to local modification by the Legislature but that until so modified they have the controlling force of legal obligations, and that it is the duty of the courts to observe and enforce them until the sovereign otherwise directs. The comity involved is the comity of the State, not of the courts. It is presumed to exist until a state expresses an intention to the contrary." (Italics ours).

With the above well settled rules of law in mind, we shall now proceed to inquire as to the public policy of this State with reference to the subject matter contained in your inquiry.

The Legislature of this State, in so far as we have been able to ascertain, has never affirmatively enacted any express legislation to the effect that a foreign insurance company, or any other foreign corporation otherwise qualified to do business in this State, should not be permitted to do business in the State of Texas if it has, as a part of its stock structure, stock issued and outstanding of no-par value. We have not found any decision, nor has our attention been called to any, where the courts of this state have directly passed upon this question. Therefore, it appears to the writer, in the absence of express legislation or decisions on the subject in question, that it will be necessary, under the rules of law above enunciated, to review the general legislation of the State and the action of the public officials charged with the enforcement of the laws here under consideration in order to ascertain whether or not it is against the public policy of this state to deny a foreign life insurance company the right to continue to transact business in this State after being once admitted and having built up a business herein, solely for the reason it has shares of stock included in its stock structure of no-par value.

It must be conceded that Chapter 3, Title 78, Revised Civil Statutes of Texas, 1925, specifically provides for the formation and regulation of domestic life insurance companies, and also provides the conditions exacted of foreign life insurance companies before such companies are entitled to transact a life insurance business in this State. It will also be noted from an observation of these statutes that the same were enacted in 1909. From an observation of the history with reference to the development of non-par stock corporations, it will be found that New York was the first state to provide that corporations could be formed with non-par value stock. This law of New York was enacted in 1912. *American Refining Company vs. Staples*, 260 S. W. 614; 56 Am. Law Review, 321; 26 Harvard Law Review, 729; 21 Columbia Law Review, 278. Therefore, it must be borne in mind that at the time of the passage of laws in Texas regulating and providing for foreign insurance companies coming into this State

it is not likely that the Legislature had in mind corporations having stock of no-par value.

From an examination of Chapter 3, Revised Civil Statutes of 1925, and especially Articles 4755 et seq., the same being a portion of the Act of 1909 above referred to, we find that a foreign life insurance company, upon applying for a permit to do business in this State, is required to furnish the Commissioner of Life Insurance with a written report showing the name and location of the company, amount of its capital stock, the amount of such capital stock paid up, assets of the company, liabilities, losses, etc., and it is also required to furnish a certified copy of its articles of incorporation, with all amendments, copy of its by-laws, the names and residences of its officers and directors. Nowhere in this chapter, or any where else in the statutes of this State, do we find any mention made by the Legislature, as a requirement of a foreign life insurance company, that its capital stock must be of a fixed or designated denomination before it will be permitted to do business in this state. We do find, in Article 4757, Revised Civil Statutes of Texas, the following language:

"No such foreign life insurance company . . . shall transact any business of insurance in this state unless such company is possessed of at least \$100,000 of actual paid-up cash money capital invested in such securities as provided under the laws of the State, territory or country of its creation."

It is interesting to note that the Legislature did not use the words "capital stock" in this statute. It will be observed that Chapter 3, above referred to, does not provide that either a domestic life insurance company or foreign life insurance company must have stock of a designated denomination. It is provided, however, in Chapter 2, Article 4704, Revised Civil Statutes of 1925, as amended by the Acts of the 40th Legislature, page 155, that "the stock of any insurance company organized under the laws of this State shall be divided into shares of not less than Ten Dollars each, and not more than One Hundred Dollars each."

Looking to the history of Chapter 2, Title 78, of which Article 4704 is a part, it will be observed that the same was originally passed as an act regulating and controlling fire and marine insurance companies. It may, therefore, be contended on the one hand that this particular statute only applies to fire and marine insurance companies while, on the other, it may be asserted that the codifiers of 1925 intended the provisions of Chapter 2 to be applicable to all insurance companies with capital stock, where not inconsistent with specific legislation with reference to the same. It is unnecessary, however, in this opinion to pass upon this question inasmuch as Article 4704 specifically relates to insurance companies organized under the laws of this State and could not, by any strained construction, be construed to apply to a foreign life insurance company seeking to do business in this State.

It seems to be a well settled rule of law that a statute of a state granting powers and privileges, and providing for the regulation and control of corporations, in the absence of any clear intention to the contrary, will be construed to apply only to corporations created by

the State. See in this connection the following authorities: *Olds vs. City Trust Company*, 185 Mass. 500, 70 N. E. 1022; *Musch vs. Hitchcock*, 212 N. Y. 283; 106 N. E. 75; *In Re Reffron Company*, 216 Fed. 642, *South vs. Rosa*, 22 Pac. (Cal.) 222; *Mortgage Company vs. Hughes*, 89 Fed., 182; *Young vs. Moore*, (Mich.) 127 N. W. 29; 14-a *Corpus Juris*, 1242. *Borgardus vs. Fitzpatrick*, 247 N. Y. S. 692; *Southern Power Company vs. Railroad Commission of California* 271 Pac. 747.

There was no law of this State permitting any corporation to be formed with non-par value stock until 1925. See Chapter 19-a, Title 32, Revised Civil Statutes of 1925. It was then provided that any corporation for profit could be organized in this state, or one already organized in this State could amend its charter and issue stock of non-par value. It will be noted from an observation of this statute that corporations doing an insurance or banking business were excepted from the provisions of the act. This act deals specifically with corporations organized under the laws of this State and does not, by the provisions thereof, attempt to provide any restrictions with reference to the stock structure of a foreign corporation. Therefore, for this reason, we do not think it has any particular bearing on the question here under consideration nor do we think it has any particular significance because, it excepts from the provisions thereof, insurance companies and banking corporations inasmuch as it has always been the policy of this state to legislate specifically with reference to such corporations.

The foregoing resume of the statutes of this state, in our opinion, fairly represents the legislative policy of the state with respect to corporations being permitted to be organized under the laws of this state with non-par value stock, and also includes all legislation on the particular subject matter with reference to the stock structure of such corporations. It is significant to note, we think, that nowhere in the history of the legislation of this State has the Legislature sought to impose upon a foreign corporation, including life insurance companies, any restriction with reference to the internal stock structure of such corporations. The Legislature, in its failure to have ever passed any law attempting to place restrictions upon the stock structure of a foreign corporation before it would be permitted to do business in this State, probably in its wisdom fully realized that it would be impracticable to enact such law because of the fact that the laws of the various states vary so much with reference to the stock structure of corporations created by such states.

If we be permitted to look to the action of the public officials charged with the duty of issuing permits to foreign corporations to do business in this State with non-par stock, including insurance companies, which we think we are permitted to do, we find that the Secretary of State did, prior to the passage of the law in 1925 permitting domestic corporations to be organized with non-par stock, issue permits to foreign corporations to do business in this State which had, as a part of their stock structure, stock of non-par value. See in this connection *Staples vs Kirby Petroleum Company*, 250 S. W. 293; *American Refining Company vs. Staples*, 260 S. W. 614. In the last case cited

Judge McClendon, Chief Justice of the Court of Civil Appeals at Austin, made the following observation :

"Both parties concede that our statute was not designed to apply to non-par value stock corporations and is not readily adjustable to no-par value stock corporations. This fact, however, has not been thought by the Attorney General and Secretary of State sufficient to deny a permit to such companies, and this view was upheld in *Staples vs. Petroleum Company* above following *State vs. Sullivan*, and *Petroleum Company vs. Hopkins*."

From an observation of this decision, and the language used therein by Judge McClendon, it is apparent that the Secretary of State permitted foreign corporations to do business in this State prior to the passage of the non-par stock law above referred to in 1925. As evidenced by the statement of facts submitted herein for our consideration it appears that the Board of Insurance Commissioners of this State has permitted at least two foreign life insurance companies to come into this State and has issued to them permits to do business in this State, even though such corporations have, as a part of their stock structure, stock of non-par value.

The action of these public officials with reference to the matter here under consideration is called to your attention solely for the purpose of showing the departmental construction placed upon the policy of this state with reference to foreign corporations being permitted to do business in this State with stock of non-par value, and especially with reference to foreign life insurance companies. This construction, we think, is entitled to great weight for it is a well settled rule of law in Texas that when the construction of the law is doubtful, the construction given them by officers of the state expressly charged with the duty of their enforcement is entitled to great weight and unless the court is clearly of the opinion that such construction is erroneous, it should not give the law a different meaning. *Harris County vs. Hammond*, 203 S. W. 445; *Railway Company vs. Taylor*, 81 Texas, 602; *Associated Retail Credit men vs. Jane Y. McCallum*, 41 S. W. (2d) 45; *United States vs. Graham*, 110 U. S. 219; *United States vs. Falks*, 204 U. S. 143.

While the courts of this State, as heretofore stated, have never passed upon the question here under consideration, the courts of last resort in California, Illinois, Missouri and Kansas have passed upon practically the identical question and, in each instance, have sustained the foreign corporation's right to come into the respective states and do business even though there were no laws in such states permitting domestic corporations to be organized and have, as a part of their stock structure, stock of no-par value. See in this connection *People vs. Lowe* (Ill.) 172 N. E. 17; *Commonwealth Acceptance Corporation vs. Jordan*, Secretary of State, Sup. Ct. Calif., 198 Calif. 619, 246 Pac. 796; *State vs. Sullivan*, Secretary of State, 288 Mo. 261, 221 S. W. 728; *North American Petroleum Company vs. Hopkins*, 105 Kan. 161, 181 Pac. 625; *Thompson on Corporations*, Third Edition, Vol. 5, p. 3642, page 446.

In the case of *People vs. Lowe*, supra, Mountain States Life Insurance Company, a Colorado corporation, sought a permit in the State of Illinois to conduct a health and accident business. The Insurance

Commissioner refused such permit and, among other things, contended that the company could not be permitted to do business in the State of Illinois because the statutes of Illinois, properly construed, did not authorize a foreign insurance company having capital stock of no-par value to do business in Illinois. There was no prohibitory statute in the State of Illinois providing against foreign insurance companies doing business in Illinois if such companies had non-par stock. There was, however, a provision of the Illinois statutes which provided that domestic corporations were required to have par value stock of not less than \$25.00 nor more than \$100.00. The Court, in disposing of this contention, made the following observation:

"The rule is that where there is no positive prohibitory statute, the presumption under the law of comity that prevails between the states of the union is that the state permits a corporation organized in a sister state to do any act authorizing by its charter or the law under which it is created, except when it is manifest that such act is obnoxious to the policy of the law of this state"

And the Court further said:

"The Supreme Court of California, in *Commonwealth Acceptance Corporation vs. Jordan*, 198 Calif. 619, 246 Pac. 796, which involved the right to license in California a Delaware corporation having no par value stock shares, that the capital stock question or structure was one which concerned merely the internal organism of the corporation and had nothing whatever to do with the transaction of the business of the corporation as between itself and the outside world, and further held that to license such a corporation in California was not permitting a foreign corporation to transact business in that state on more favorable terms than a domestic corporation merely because the foreign corporation had no-par value stock, while a California corporation with no-par value stock could not be authorized".

From an observation of this opinion it will be noted that the Illinois statutes with reference to foreign and domestic insurance companies are very similar to the Texas statutes, and this decision, we think, is very persuasive on the subject here under consideration.

In the case of *State vs. Sullivan*, supra, a foreign corporation applied to the Secretary of State for a permit to do business in California. The laws of California at that time did not permit a domestic corporation to be incorporated except and unless its stock were of par value. The corporation applying for a permit had, as a part of its stock structure, stock of non-par value, and the Secretary of State refused to issue such permit on that ground. The corporation brought a mandamus proceeding against the Secretary of State and the court held that the foreign corporation was entitled to a permit, even though the laws of California did not permit domestic corporations to be formed with such stock. In the course of the opinion the court, in discussing the doctrine of comity existing between the states, used the following language:

"It is a fact of which the court must take judicial notice, that the laws of various states which regulate and perscribe the method for the organization and the measure of the powers of private corporations *differ widely* and it is because of these differences that so many cases have arisen and been decided involving the application of the doctrine of comity to corporations seeking to enter other states than those of their creation for the purpose of transacting business therein. And out of this very diversity

has been evolved a rule which may almost be said to be a rule of necessity, that corporations which have been organized in one state in accordance with statutory methods, which do not obtain in other states, or have been given powers which corporations organized in other states do not possess, *or which have different stock structure*, or which have imposed different measures of liability or limitations of liability upon their stockholders, or which have invested such stockholders with divergent voting powers than those allowed within states other than that of their origin, may still be permitted to enter such other states and transact business therein under the doctrine of comity, *in the absence of express constitutional or statutory inhibitions on the part of those states which such foreign corporations thus seek to enter.*"

In the course of the opinion the court made this further observation in discussing the case of North American Petroleum Company vs. Hopkins, *supra* :

"In the case of North American Petroleum Company vs. Hopkins, 105 Kan. 161, 181 Pac. 625, the petitioner sought a writ or mandate to compel a consideration of the petitioner's application for permission to do business in that state. It appeared from said application that the petitioner was a foreign corporation having a capital stock divided into shares of no fixed or nominal par value as was permissible in the state of its creation. It further appeared in the record that corporations organized for profit under the laws of the State of Kansas must set forth in their articles or charter the amount of their capital, the number of shares into which that capital was divided, and the number of shares held by each stockholder. The court, while holding that the petitioner, as a foreign corporation was not such as to its frame-work as could be organized as a domestic organization under the laws of Kansas, it was, nevertheless, entitled to admission to do business in that state."

Thompson, in his able work on corporations, in discussing the question here under consideration, lays down the rule to be as follows :

"A non par value corporation organized pursuant to the laws of another state is entitled to be admitted to do business in a state whose laws do not provide for non par stock corporations. This is on the broad principle of comity. Thus the Supreme Court of Kansas has said: 'The problem of determining the solvency and bona fide capitalization of the plaintiff presents no unusual difficulty. The fact that the shares of its stock have no nominal par value is of little consequence. Any prudent charter board, in determining whether a foreign corporation is worthy of admission to do business in Kansas, would attach little importance to the nominal value of its shares of stock, even if they have a nominal value. As in all other cases, the charter board should concern itself earnestly to ascertain the genuine capital—those assets permanently devoted to the corporate business as a basis for its business credit, and upon which its hope of profits is rationally founded. The lawfully issued capital and the capital stock of such corporations are the assets that it devotes to the prosecution of its business. When the value of those assets is ascertained, the fee required to be paid by law can be based on that portion of the assets which the corporation proposes to invest and use in the exercise and enjoyment of its corporate privileges within this state'".

After a careful examination of the laws of this State, bearing in mind the liberal application which is accorded the doctrine of comity as reflected by the foregoing authorities to which we have called your attention, and in view of the fact that the officers of this State charged with the administration of the law with reference to the admission of foreign corporations to do business in this State have permitted foreign corporations, including life insurance companies,

having non-par value stock, to come into this State and build up businesses herein, we are of the opinion and so hold that the Board of Insurance Commissioners would not be authorized to forfeit the permit of the corporation here under consideration solely for the reason that it has, as a part of its stock structure, stock of no-par value if such corporation is, in all other respects, qualified to continue doing business in the State, and you are accordingly so advised.

Very truly yours,

SIDNEY BENBOW,
Assistant Attorney General.

Op. No. 2897.

OCCUPATION TAXES—LLOYDS INSURANCE ASSOCIATIONS—INSURANCE COMPANIES— STATUTES CONSTRUED.

1. The occupation taxes imposed in Article 7064, Revised Civil Statutes, 1925, should be collected from a Lloyds' insurance association writing the kinds of insurance therein specified.

2. Article 5023, Revised Civil Statutes, 1925, construed and it is held that the same does not exempt a Lloyd's insurance association from the payment of occupation taxes imposed under Article 7064, Revised Civil Statutes, 1925.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, September 23, 1932.

Honorable Moore Lynn, State Auditor and Efficiency expert, Austin, Texas.

DEAR SIR: This will acknowledge receipt of your recent favor to Attorney General James V. Allred. You wish to be advised with reference to the application of Article 7064, Revised Civil Statutes, 1925, as to insurance companies transacting business as a Lloyds in the State of Texas. The pertinent part of your inquiry reads as follows:

"Your opinion respectfully requested as to whether or not the gross premiums collected by an insurance association operating upon the Lloyds' plan in Texas are subject to the occupation tax imposed under the provisions of Article 7064, Revised Civil Statutes, 1925.

"Lloyds insurance companies are not being required to pay any occupation tax in view of Article 5025, Revised Civil Statutes, 1925, which provides as follows:

"Except as herein provided no other insurance law of this State shall apply to insurance on the Lloyds plan unless it is specifically so provided in such other law that the same shall be applicable'.

"Your attention, however, is directed to the fact that such companies are assessed a workmen's compensation insurance commission maintenance tax imposed by Article 4906 in accordance with Article 4917."

In order to properly answer your inquiry, it is necessary to ascertain whether or not the Legislature, in enacting Article 5023, Revised Civil Statutes of 1925, intended to exempt Lloyds insurance associations from the provisions of Article 7064, Revised Civil Statutes of 1925. The pertinent portion of Article 7064, Revised Civil Statutes of 1925, reads as follows:

"Every insurance company transacting the business of fire, marine, marine inland, accident, credit, title, livestock, fidelity, guaranty, surety, casualty, or any other kind or character of insurance business other than the business of life insurance within this state and other than fraternal benefit associations at the time of filing its annual statement shall report to the Commissioner of Insurance the gross amount of premiums received in this State upon property and from persons residing in this state during the preceding year, and each of such companies shall pay an annual tax upon such gross premium receipts as follows: * * *".

It will be observed from reading this statute that the Legislature did not classify insurance companies which would be subject to the tax as such upon the basis and nature of the organization of such companies, that is, there was no classification made with reference to stock companies, mutual companies, Lloyds or reciprocals, but the classification was based upon the nature of the business transacted by every insurance company regardless of the plan upon which such company was organized and transacting business. Therefore, it will first be necessary to ascertain whether or not an association operating under the Lloyds' plan, writing the class of business included in Article 7064, Revised Civil Statutes, is an insurance company within contemplation of said statute; and, secondly, it will be necessary to determine whether or not Article 7064, Revised Civil Statutes, is an insurance law and can be construed to be applicable to insurance associations operated upon the Lloyds' plan in view of Article 5023, Revised Civil Statutes of 1925.

It may not be amiss in answering the first question above stated to briefly state the nature of the organization and plan of operation of an association operated under the Lloyds' plan. Insurance operated upon the Lloyds' plan is one of the oldest forms of insurance. Such associations are unincorporated, voluntary associations of a number of individual underwriters who usually contribute to a common guaranty fund. The business is generally transacted through an agent acting in behalf of the underwriters commonly termed "an attorney-in-fact." The affairs and policy of the association are generally adopted and controlled through a committee consisting of the subscribers or underwriters. This class of insurance is very closely related to what is known as reciprocal insurance.

The chief differences between reciprocal and Lloyds insurance associations have been very ably distinguished by a writer in 58 Central Law Journal, Page 323, in the following terms:

"In Lloyds insurance there are underwriters, all of whom are insurers but not necessarily policyholders; while in reciprocal insurance all policyholders are insurers and insured. Lloyds associations, properly speaking, are more analogous to stock insurance companies, the underwriters being the stockholders while inter-insurance or reciprocal is more analogous to mutual insurance without the corporate identity of the mutual insurance company."

See also in this connection Cooley's Briefs, 2nd Edition, Vol. 1, pages 69-70-71; Sergeant vs. Goldsmith Dry Goods Company, 110 Texas 482, 221 S. W. 259, 10 A. L. R. 742.

In Lloyds' associations each underwriter or subscriber usually specifies the amount he underwrites. Such subscriber or underwriter may limit the amount of his liability to the amount he has subscribed.

It is usually provided, however, that each subscriber will be liable on a loss incurred under a policy written by such association only to his proportionate part of such loss not to exceed the maximum amount subscribed by such underwriter. The laws of this state specifically provide that such underwriter may limit his liability to the amount of his subscription. See Article 5018, Subdivision (b), Revised Civil Statutes of Texas as amended by Acts, Forty-first Legislature, First Called Session, page 32.

This form of insurance, as stated by the writer of the article in 58 Central Law Journal, *supra*, is very analogous to a stock company. The assets of a stock company are obtained by the sale of stock, and the stockholders liability, as a general rule, is limited to the amount of stock purchased. The assets in a Lloyds are usually obtained by several subscribers contributing to a common fund, and such subscribers' liability is limited to the amount subscribed. The profits in a stock company, as a rule, are divided among the stockholders in proportion to the amount of stock owned by each respective stockholder. The profits in a Lloyds are usually divided among the subscribers or underwriters in proportion to the amounts subscribed or underwritten by each respective underwriter or subscriber. The policyholders in both a stock company and in an association operated on the Lloyds' plan are not entitled generally to participate in the profits except and unless such policyholders are entitled to the same under and by virtue of a contract which is usually provided in what is known as "participating policies." See in this connection Cooley's Briefs, *supra*; Couch on Insurance, Vol. 1, Par. 37; 58 Central Law Journal, page 323; Barnes vs. People, 168 Ill 425, 48 N. E. 491; Merchants Exchange vs. Southern Trading Company (Com. of Apps.) 229 S. W. 312.

In view of the broad language used in this statute we are of the opinion that the words "insurance company" should be construed to include not only corporations writing the kind of insurance specified therein, but also an association operating on the Lloyds' plan. The word "company" is defined in Bouvier's Law Dictionary, at page 471, as "an association of a number of individuals for the purpose of carrying on some legitimate business. The term is not synonymous with partnership, even though every such unincorporated company is a partnership. Usage has reserved the term to associations whose members are in greater number, their capital more considerable, and their enterprises greater, either on account of their risks or importance. When these companies are authorized by the government they are known by the name of corporations."

The word "company" has been defined by the Supreme Court of Mississippi as being synonymous with the word "association." See Lee Mutual Fire Insurance Company vs. State, 60 Miss. 395.

The Supreme Court of Illinois has held that the words "company" and "corporation" are commonly used as interchangeable terms. Goddard vs. Chicago, Northwestern Railroad Company, 202 Ill. 362, 66 N. E. 1066.

The Supreme Court of Missouri, in construing a statute with reference to the word "company," held that the word "company some-

times includes individuals as well as corporations, so that as used in Revised Statutes of Missouri, 1889, Par. 5910, providing no company shall transact business in the state without a certificate, the word company will be held as including both companies and associations of individuals." State vs. Stone, 24 S. W. 164, 25 L. R. A. 243.

In view of the authorities above cited, the broad language used, and the close similarity of a Lloyds' insurance association to that of a stock company, we are of the opinion as heretofore stated, that the term "insurance company" as used in Article 7064, Revised Civil Statutes of 1925, should be construed to include an insurance association writing the insurance therein specified under the Lloyds' plan.

Due to the construction we have just placed upon this statute it now becomes necessary to determine whether or not Article 7064 is an insurance law within contemplation of Article 5023, Revised Civil Statutes of 1925, and whether Lloyds are exempt from the provisions thereof because of not being specifically mentioned therein as provided in Article 5023. We are of the opinion that Article 7064 is not an insurance law within the contemplation of Article 5023. It will be noted that Article 7064 is codified under Title 122, Chapter 2, Revised Civil Statutes of Texas, the heading of which reads as follows: "Taxes Based Upon Gross Receipts." It will also be observed that this entire chapter deals specifically with occupation taxes on various classes and kinds of businesses which, of course, is in the nature of a revenue measure. The caption of the Act of 1911, page 216, which is now Article 7064, clearly shows that the act was passed as a revenue measure, the pertinent portion of said caption reading as follows:

"AN ACT * * * imposing an occupation tax upon fire, fire and marine, marine inland, and tornado insurance companies transacting business in this state * * *."

The Supreme Court of Texas, in the case of Kansas City Life Insurance Company vs. Love, 101 Texas 531, 109 S. W. 863 has also construed this act to be an occupation tax for the purpose of raising revenue.

We are clearly of the view that the language used in Article 5023, Revised Civil Statutes of 1925, to the effect "except as herein provided no other insurance law of this state shall apply to insurance on the Lloyds' plan unless it is specifically so provided in such other law that the same shall be applicable," should not be construed to exempt a Lloyds' insurance association from the provisions of Article 7064, Revised Civil Statutes of 1925, if such association is writing the class of insurance therein specified. To place such a construction upon this article would be to ingraft an exemption on a general revenue measure which may render the general measure of doubtful constitutionality. See in this connection Connolly vs. Union Sewer Pipe Company, 184 U. S. 540; Beatrice Creamery vs. Lyons, 9 Fed. (2d) 176; Ross vs. Corporation Commission, 278 U. S. 515.

If Article 5023 should be construed to exempt companies operating under the Lloyd's plan writing the classes of insurance specified in Article 7064 from the provisions thereof, it would be placing a con-

struction upon same which would discriminate against other companies writing the same class of business, and may also place doubt upon the constitutionality of Article 7064 because, Article 8, Section 2 of the Constitution of Texas specifically provides :

“All occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax.”

The Supreme Court of Texas, in the case of Pullman Palace Car Company vs. State, in construing occupation tax statutes in the light of the above article of the constitution laid down the rule as follows :

“An occupation tax which is not equal and uniform but which exempts one class of persons pursuing an occupation and imposing a tax on others pursuing the same occupation is violative of this section and can be enforced against neither class of persons.” (64 Tex., 274).

It must be admitted that Article 7064 does not attempt to apply the tax to an insurance company as such with reference to the nature of its organization but, on the contrary, applies the tax to the nature of the business or occupation being pursued by such company which is the kind of insurance being written by any such company as specified in said article.

Exemptions from taxation are never favored, and in construing laws exempting any citizen or class of property or business all doubt should be resolved against such exemptions. See Santa Rosa Infirmary vs. City of San Antonio, (Com. of Apps.) 259 S. W. 926; State vs. Settegast (Com. of Apps.) 254 S. W. 925.

In view of what we have heretofore said in this opinion it is our conclusion, and you are so advised, that the Board of Insurance Commissioners should collect the tax imposed in Article 7064, Revised Civil Statutes, 1925, from every Lloyds' insurance association transacting business in the State of Texas which writes the kinds and classes of insurance specified in said article. In arriving at this conclusion, however, we have not been unmindful of the fact that the Board of Insurance Commissioners has construed this statute to the contrary; neither have we neglected to give consideration to that well settled rule of law to the effect that, if there be any doubt in the construction to be placed upon a statute, the long and continued construction placed thereon by a public official charged with the enforcement thereof will be given great weight and followed by the courts unless it clearly appears that such construction placed upon same by the head of such department be clearly erroneous. See in this connection Harris vs. Hammond, 203 S. W. 445; Railway Company vs. Taylor, 81 Texas 602; Associated Retail Credit Men vs. McCallum, 41 S. W. (2d) 45.

In the last case above cited the Secretary of State had construed a franchise tax law for many years to exempt corporations conducting a retail credit business from the provisions thereof. The Commission of Appeals in this case commented upon the rule of law above stated, and held that the construction placed upon the statute by the Secretary of State exempting such corporations from the provisions thereof was erroneous, and that the tax should have been collected.

It, therefore, necessarily follows from what we have said that we believe the construction placed upon Article 5023, Revised Civil Statutes, 1925, by the Board of Insurance Commissioners to be erroneous and the tax should be collected.

Trusting we have answered your questions fully, we are
Very truly yours,

SIDNEY BENBOW,
Assistant Attorney General.

Op. No. 2898.

OCCUPATION TAXES—SURETY AND GUARANTY INSURANCE COMPANIES
—INSURANCE COMPANIES—STATUTES CONSTRUED.

1. Insurance companies transacting the business of fidelity, guaranty, and surety insurance in this State, as authorized under Title 78, Ch. 16, R. C. S. 1925, should be required to pay an occupation tax on the premiums received from such business, as provided in Article 7064, R. C. S. 1925.

2. Trust Companies authorized under Article 4982, et seq., R. C. S. 1925, doing a fidelity, guaranty, and surety business are also required to pay the occupation tax as provided in Article 7064, R. C. S. 1925, on its gross premiums received in this State from the transaction of such business.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, Sept. 28, 1932.

Honorable Moore Lynn, State Auditor and Efficiency Expert, Capitol Station, Austin, Texas.

DEAR SIR: This will acknowledge receipt of your favor to Attorney General James V. Allred. You desire an opinion from this Department, based upon the following inquiry:

"In Re Occupation tax on insurance companies.

"Article 7064, R. C. S. 1925, pertaining to every insurance company transacting the business of fire, marine inland, accident, credit, title, live stock, *fidelity, guaranty, surety, casualty*, or any other kind of character of business other than the business of life insurance within this state, and other than fraternal benefit societies * * * ."

"Article 4769, R. C. S. 1925, pertaining to every life insurance company not organized under the laws of this state transacting business in this state."

"Your opinion is respectfully requested as to whether or not the gross premiums collected by insurance and trust companies doing a fidelity, guaranty, and surety insurance business as authorized under Ch. 16, R. C. S. 1925, are subject to occupation taxes, and under which of the above and/or other law, shall the tax be collected." '

Title 78, Ch. 16, R. C. S. 1925, provides that domestic corporations may be created as provided in such Chapter for the purpose of doing a general fiduciary and depository business, and to act as surety and guarantor of the fidelity of employees, trustees, executors, administrators, guardians, or others appointed to, or assuming the performance of any trust, public or private. And this chapter also provides that foreign corporations may be admitted to do business in Texas for the same purpose or purposes. See Article 4969, et seq.

It is also provided in this chapter of the statutes above referred to

that any person or association of persons and any state banking corporation or any other domestic corporation or any corporation organized under the laws of any other state, provided such foreign corporation complies with the laws of this state relating to insurance other than life insurance, may become sole guarantor or surety upon any bond required to be given under the laws of this state. See Article 4982 et seq. R. C. S., 1925. The authority granted under this article just above quoted, however, is conditioned that such corporation shall pay the taxes as provided by law on surety and bond business as required of any other surety company. See Sec. 5, Art. 4983, R. C. S., 1925.

Article 7064, R. C. S., 1925, provides that "every *insurance company* transacting the business of fire, marine, marine inland, accident, credit, title, live stock, *fidelity, guaranty, surety*, casualty, or any other kind or character of insurance business other than the business of life insurance within this state, and other than fraternal benefit associations, at the time of filing its annual statement, shall report to the Insurance Commissioner the gross amount of premiums received in the State upon property and from persons residing in this state during the preceding year, and each of such companies shall pay an annual tax upon such gross premium receipts as follows: . . ."

It is obvious from reading this statute that the Legislature has intended that where an insurance company collects premiums from fidelity, guaranty, and surety business, that such companies will be subject to the tax as provided in this article. It is also clear that the Legislature intended trust companies, permitted under Article 4982, R. C. S. to transact such business, to pay the same occupation tax as required of an insurance company on the premiums received by it from transacting fidelity, guaranty, and surety business.

The only question requiring consideration, in the opinion of the writer, is whether or not a corporation doing business in the State of Texas, under and by virtue of the provisions of Ch. 16, Title 78, R. C. S., is to be considered an insurance company within contemplation of Art. 7064, R. C. S., 1925. If answered in the affirmative, as heretofore stated, it is obvious that the Legislature intended its premiums received from transacting fidelity, guaranty, and surety business to be subject to the provisions of this article.

The courts of this state have uniformly held that a fidelity surety, or guaranty bond is a contract of insurance and should be construed and considered the same as any other contract of insurance. See in this connection *National Surety Company vs. Murphy-Walker Company*, 174 S. W. 997; *Western Indemnity Company vs. Free and Accepted Masons*, 198 S. W. 1092; *Southern Surety Company vs. Citizens State Bank*, 212 S. W. 556.

In the case of *National Surety Company vs. Murphy*, supra, the Court, in commenting upon this particular question, used the following language:

"The obligation sued on is one of that class of contracts that have come before the courts in recent years having for its object the indemnity of the employer against loss due to dishonesty of the employee. They are compensated sureties, the contract entered into for a premium, paid after the

fullest investigation, based upon written representations, relative to the extent of the risk, and *by a company incorporated for the express purpose of furnishing guaranty bonds as a means of revenues to the corporation and its stockholders. There are in principle no facts which differentiate such contracts from guaranty insurance, and the same rules of construction must apply thereto as applied to other insurance contracts.*"

Citing the following authorities: *People vs. Rose*, 174 Ill., 310, 51 N. E. 246, 44 L. R. A. 124; *Briefs on Law of Insurance*, Cooley, Vol. 1, p. 8 (f); *Remington vs. Fidelity Company*, 27 Wash. 429, 67 Pac. 989; *Cowles vs. U. S. Company*, 32 Wash. 120, 72 Pac. 1032; *Front on Law of Guaranty Insurance*, para. 2; 19 Cyc. 516; *Title Company vs. Bank of Fulton*, 89 Ark. 471, 117 S. W. 537, 33 L. R. A. (N. S.) 676.

While insofar as we have been able to ascertain, no court of this state has expressly held that a corporation or an association writing fidelity, surety, and guaranty business to be an insurance company, however, we do think that because the courts of this state have held that such contracts are contracts of insurance, it would, then necessarily follow by implication that all such corporations or associations doing this class of business should be considered and understood as insurance companies within the spirit and meaning of the laws of this state with reference to insurance companies.

Vol. 2, p. 1635, *Bouvier's Law Dictionary* defines an insurance company to be as follows:

"A company which issues policies of insurance, an incorporated company, and either a stock company, a mutual one, or a mixture of the two."

In view of this commonly accepted definition of an insurance company as set forth above, we are clearly of the opinion that inasmuch as our courts have held fidelity, surety, and guaranty contracts to be contracts of insurance, that any company issuing the same within the State of Texas should be considered and held to be an insurance company, and within the purview of Article 7064, R. C. S., 1925.

Article 4769, R. C. S., 1925, called to our attention in your inquiry, in our opinion, has no application to the facts herein considered, because this article pertains to the taxation of life insurance companies not organized under the laws of this state, which are, however, transacting business in this state.

Due to the conclusions we have hereinbefore reached, it necessarily follows that we are of the opinion that the occupation tax imposed in Article 7064, R. C. S., 1925, should be collected from every insurance company (including trust companies) doing fidelity, guaranty, or surety business within this state as authorized under Title 78, Ch. 16, R. C. S., 1925, and you are accordingly so advised.

Sincerely yours,

SIDNEY BENBOW,
Assistant Attorney General.

**OPINIONS RELATING TO RAILROADS AND MOTOR
CARRIERS**

OP. 2821.

RAILROADS—STATUTORY CONSTRUCTION—ONE TRAIN A DAY

1. The words "at least one train a day" as used in Sub-division 2, Article 6479, mean "one train a day each way."

2. Questioned words need not be construed or applied in the strict literal sense of the terms. If the words are sufficiently flexible to admit of some other construction, by which Legislative intent can be better effected, the law requires adoption of that construction.

3. When there are other statutes, though enacted at different times, relating to the same subject, effect should be given all of them.

4. Sound public policy requires the solving of doubts in favor of the construction put upon the laws by the departments and officers charged with their administration.

5. Sub-division 2, Article 6479, should be treated prospectively with Article 6357, in order that effect may be given both.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, Jan. 17, 1931.

Railroad Commission of Texas, State Capitol Building, Austin, Texas.

GENTLEMEN: Your letter of December 6th, addressed to the Attorney General, reads in part as follows:

"There has been filed with the Commission by the Texas and New Orleans Railroad Company an application praying for authority to rearrange the passenger train schedule on the Mexia sub-division of that line, generally known as the Nelleva cut-off, and extending from Mexia through Normangee to Navasota."

"At the present time one train each way each day is operated over this division of the applicant's line, and their application contemplates the elimination of one of these trains affording passenger train service one way each day, or differently stated, one train northbound one day and one train southbound the following day. Under this schedule there would be no passenger train service northbound three days of each week, and, likewise no passenger train service southbound three days of each week, although, under the arrangement, mail and express would be handled each day, moving northbound through Navasota on the day the train operates northbound, and southbound through Mexia on the day the train operates southbound.

"For the Commission's guidance in its consideration of this application, and of similar applications which might be presented in the future, your opinion as to whether or not the Commission would have authority under the law to permit any railroad company to operate less than one passenger train *each way* each day, Sundays excepted, over its line, or lines, is requested. This, of course, does not have reference to lines less than fifty miles in length and the gross annual passenger earnings of which are less than \$3,600.00 as specifically covered by the amended Section 2 of the Article."

The question presented is whether the words, at least one train a day," mean that railroads carrying passengers for hire shall run one train a day each way, or that such railroads may run only one train in one direction during each twenty-four hour period, as that expression is used in Sub-division 2, Article 6479, R. C. S. 1925, as

Amended by Acts of 1927, Fortieth Legislature, Page 283, Chapter 198, Section 1.

Article 6479 makes it the duty of the commissioners

“ . . . to see that, upon every railroad and branch of same carrying passengers for hire in this State, shall be run at least one train a day, Sundays excepted, upon which passengers shall be hauled. . . ”

Said Article, as amended, provided the Commission shall not have power to relax this provision except in case such railroad is less than fifty miles in length, and has a gross annual passenger revenue of less than \$3,600.00. The amendatory provision not being applicable to the case stated, leaves no discretion with the Commission.

The words, “one train a day,” considered alone, might admit of the construction placed upon them by your applicant in this instance, but we believe such construction is inconsistent with the general purpose and intent of state railway legislation.

That questioned words need not be construed or applied in the strict literal sense of the terms, is a well settled rule of construction. (Kent's Commentaries 461). If the words are sufficiently flexible to admit of some other construction, by which the legislative intent can be better effected, the law requires that construction to be adopted (Story vs. Houston Street Ry. Co., 92 Tex. 129; 46 S. W. 796.) When there are other statutes, though enacted at different times, relating to the same subject, they are considered together as though they constituted one act. Effect should be given to all of them. (Farmer vs. Shaw, 93 Tex. 438, 55 S. W. 1115. See also Lewis' Sutherland Statutory Construction 2nd Ed., Section 443.)

In view of these authorities, we may consider the whole subject of railroad legislation, being Title 112 of the R. C. S., 1925, and each of its parts, in determining what construction the Legislature intended should be placed on the words in question. A careful review of the Acts affecting railroads, including their preamble, reveals in brief, that the primary object of said Legislation is to prevent discrimination and extortion in charges, to insure reasonable freight and passenger charges, and to require service adequate to meet the needs of passengers and freight. While the regulations must be reasonable, they are administered for the public's convenience and necessity above all other considerations.

In this connection consider Article 6357, R. C. S., 1925, which provides that railroads

“ . . . shall start and run their cars for the transportation of passengers and property at regular times to be fixed by public notice, and shall furnish sufficient accommodation for the transportation of all such passengers and property, as shall, within a reasonable time previous thereto, offer, or be offered for transportation, at the place of starting and at junctions of other roads and at sidings and stopping places established for or receiving and discharging way passengers and freight and shall take, transport and discharge such passengers and property at, from and to such places, on the due payment of the tolls, freight or fare legally authorized therefor. Failure on the part of railroad companies to comply with the requirements of this Article shall be deemed an abuse of their rights and privileges and such abuse shall at once be corrected and regulated by the Railroad Commission. . . ”

Note that by its terms railroads are required to accommodate "all such passengers and property" as shall offer themselves, or be offered, for transportation. If the construction your applicant places upon the words, "one train a day" is adopted, the object and purpose of Article 6357 would be defeated. A railroad operating a train one way each day could not accommodate "All such passengers and property" offered for transportation. Viewed from the standpoint of "all such passengers and property," a railroad operating on such a schedule would be running a train only every other day, and in violation of Article 6479, as well as Article 6357. Treating the two statutes prospectively and giving effect to both, railroads are required by their terms to operate a train a day each way in order that all passengers and freight may be accommodated. That these two Articles should be construed together is supported by the case of Railroad Commission of Texas et al vs. Galveston, H. & S. A. Ry. Co., 112 S. W. 345; 345.

You state in your letter the Commission has always interpreted the words "one train a day" to mean one train a day each way. The Supreme Court in the case of Moorman vs. Terrell, 202 S. W. 727, used the following language:

"Again, sound public policy requires the solving of mere doubts in favor of the construction put upon laws by the departments and officers charged with their administration . . ." (See authorities therein cited).

We think there is no doubt about the construction we have placed on the matter in question, but if there is, certainly, in view of these authorities, such doubts should be resolved in favor of the construction placed upon it by the Railroad Commission.

Accordingly, you are advised that it is the opinion of this Department that the words "at least one train a day," as used in Sub-division 2 of Article 6479, mean "one train a day each way."

Very truly yours,

ELBERT HOOPER,
Assistant Attorney General.

Op. No. 2830.

RAILROAD COMMISSION—APPLICATION OF MOTOR CARRIERS TO TRANSFER CERTIFICATES—FEES FOR TRANSFER OF CERTIFICATES.

1. Motor carriers shall apply to the Railroad Commission before transferring certificates authorizing them to operate as such.
2. Transfer of certificates shall be approved by the Railroad Commission.
3. Ten per cent of the price for which certificate is sold shall be paid to the Railroad Commission.
4. Such fee is due and payable upon the approval of transfer by Railroad Commission.
5. Construing the last paragraph of Section 5, Chapter 314, page 698, Acts of the Forty-first Legislature.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, January 31, 1931.

*Railroad Commission of Texas, Motor Transportation Division,
Austin, Texas.*

GENTLEMEN: The Attorney General is in receipt of your letter of January twenty-eighth, reading, in part, as follows:

"Will you give to the Railroad Commission a departmental opinion as to whether or not, in transferring a certificate from a partnership to a corporation, they shall comply with the law providing that application shall be filed and ten per cent of the value of the certificate be paid to apply to the account of the Highway Commission.

"The facts are as follows:

" 'The Red Arrow Freight Lines, until on or about January 1, 1931, was a co-partnership owned by L. B. Brown and Harry Brown. On or about January 1st, the Brown brothers incorporated under the name of 'Red Freight Lines, Inc.'

" 'The laws of this State provide that there must be as many as three incorporators to secure a charter. To meet this requirement of the statute, one share of stock was issued to a third party in order to secure the charter. This custom has long been practiced in Texas.

" 'The properties belonging to the co-partnership including the certificate of convenience and necessity now belong to the corporation. The Brown brothers own all of the stock of the corporation except the one share above mentioned.

" 'The question now arises 'is it necessary to comply with the provisions of Section 5, Chapter 314, Acts of the Regular Session of the Forty-first Legislature? (Motor Carrier Law). Is it necessary to file a formal application with the Commission seeking the approval of the transfer of the certificate from the co-partnership to the corporation; also, has any liability accrued for the payment of the 10% provided for in Section 5? If so, what amount and by whom should the payment be made?' "

You refer to the last paragraph in Section 5 of Chapter 314, page 698, of the Acts of the Forty-first Legislature, Regular Session, reading, as follows:

"Any certificate . . . owned . . . by any Class "A" motor carrier . . . may be . . . transferred, . . . provided, however, that any proposed . . . transfer shall be first presented in writing to the Commission for its approval or disapproval and the Commission may disapprove such proposed . . . transfer, if it be found and determined by the Commission that such proposed . . . transfer, is not made in good faith, or that the proposed . . . transferee is not able or capable of continuing the operation of the equipment proposed to be . . . transferred, in such manner as to render the service demanded by the public necessity and convenience on and along the designated route; provided, however, that in case a certificate is transferred that the transferee shall pay to the Commission a sum of money equal to ten per cent (10%) of the amount paid as a consideration for the transfer of the certificate, which sum of ten per cent (10%) shall be deposited in the State Treasury to the credit of the "Highway Fund" of the State."

Section 1 of the same act defines the term "motor carrier" to mean, among other things, any person, firm, corporation or co-partnership operating any motor vehicle along the highways of this State for the purpose of transporting property for compensation or hire. That a corporation is a "person" in legal contemplation, separate and distinct from its stockholders or from a co-partnership is too well

settled to require discussion. (State vs. Railway Company, 143 S. W. 223). It is likewise well settled that a transfer of property from a co-partnership to a corporation is a transfer from one person to another, in a legal sense, even though the co-partnership was composed of the same individuals holding a principal part of the stock in the corporation. (Dawson vs. McLeary, 20 S. W. 1044).

You are, therefore, advised: (1) That a co-partnership, owning a certificate or certificates granted by the Railroad Commission authorizing it to carry property for hire as a motor carrier, shall, before transferring the same to a corporation, apply in writing to the Commission for its approval or disapproval of such proposed transfer, and (2) that when such transfer is proposed to the Commission one of the conditions of such approval by the Commission is the payment of a sum of money equal to ten per cent of the amount paid by such corporation for such certificate or certificates, and the same becomes due and should be collected when such transfer is approved, and (3) that such payment should be made by the transferee, being, in this instance, the corporation.

We are not in a position to advise the exact amount which will be due when the transfer is approved, for the reason that we do not know what the corporation paid the co-partnership for the certificates.

Very truly yours,

ELBERT HOOPER,
Assistant Attorney General.

Op. No. 2841.

MOTOR BUS AND MOTOR TRUCK LINES—CERTIFICATES OF CONVENIENCE
AND NECESSITY—CONSTITUTIONALITY OF LAW FORBIDDING ISSU-
ANCE OF SUCH CERTIFICATES WHERE INTEREST IN LINE IS
OWNED BY ANY RAILROAD.

1. Legislature may constitutionally make it unlawful for a railroad company to own an interest in motor bus or motor truck line doing business in this state.

2. Legislature may constitutionally provide that the railroad commission shall withdraw and cancel any certificate of convenience and public necessity heretofore issued to any bus line or motor truck line where an interest in such line is retained by a railroad company.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, April 8, 1931.

Hon. Elbert M. Barron, House of Representatives, Austin, Texas.

DEAR SIR: This department is in receipt of your request for an opinion as to the constitutionality of House Bill No. 249 relating to the ownership by railroads of stock or financial interest in any motor truck company or motor bus company used for the purpose of transporting freight or passengers for hire in this state.

After a careful study of the provisions of this bill and of the authorities pertinent thereto, we have come to the conclusion that the bill is constitutional.

One objection raised to the validity of the bill is that same consti-

tutes a burden on interstate commerce. It is well settled that the state has the power, in the interest of the public, reasonably to control and regulate the use of its highways, so long as it does not directly burden or interfere with interstate commerce. *Interstate Bus Corporation vs. Holyoke Street Railway Co.*, 47 Supreme Court Rep. 298, and authorities there cited. Naturally, the State of Texas cannot, constitutionally, enact legislation which has the effect of directly interfering with, or unduly burdening interstate commerce; but, as we construe the act in question, it has reference only to intrastate commerce.

It will be noted that the act relates only to "motor truck carriers or motor bus carriers for the purpose of transporting any freight or passengers for compensation or hire *in this state*." Since the act, by its terms, is restricted to companies transporting freight or passengers in this state, and this is further shown by the fact that the act speaks of certificates of convenience and public necessity issued, and to be issued, by the Railroad Commission, which Commission, of course, has no control over interstate commerce, it is the opinion of the department that the interstate commerce clause of the Federal Constitution is not violated by the act in question.

Article 1, Section 26, of the Bill of Rights of the Texas Constitution, is in part as follows:

"Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed. . . ."

Article 10, Section 5, of the Constitution of Texas, is as follows:

"No railroad or other corporation, or the lessees, purchasers or managers of any railroad corporation, shall consolidate the stock, property or franchises of such corporation with, or lease or purchase the works or franchises of, or in any way control any railroad corporation owning or having under its control a parallel or competing line; nor shall any officer of such railroad corporation act as an officer of any other railroad corporation owning or having the control of a parallel or competing line."

Article 10, Section 2, of the Texas Constitution, provides in part as follows:

"The Legislature shall pass laws to regulate railroad freight and passenger tariffs, *to correct abuses* . . . in the rates of freight and passenger tariffs on the different railroads in this state, and enforce the same by adequate penalties; and to the further accomplishment of these objects and purposes may provide and establish all requisite means and agencies invested with such powers as may be deemed adequate and advisable."

Pursuant to the authority vested in it by the section last quoted, the Legislature has created the Railroad Commission of Texas, but the Powers which the Legislature is authorized to confer on the Railroad Commission are not restricted to the regulation of railroads and rates only. *Oxford Oil Company vs. Atlantic Oil Producing Company*, 22 Federal (2d) 597.

In accordance with its powers, the Legislature has heretofore placed the regulation of motor bus transportation and motor carrier transportation under the supervision of the Railroad Commission. See Article 911a, Acts 1927, Fortieth Legislature, page 399, Chapter 270, as amended, Acts 1929, Forty-first Legislature, First Called Session,

Chapter 78; and Article 911b, Acts 1929, Forty-first Legislature, page 698, Chapter 314, as amended, Acts 1929, Forty-first Legislature, Second Called Session, page 38, Chapter 24, Vernon's Revised Civil Statutes of 1925. These two articles set out the conditions under which motor bus companies and motor freight companies may apply for, and receive from the Railroad Commission certificates of convenience and necessity to transport persons and freight over the public highways of Texas. Any certificate of convenience and necessity is issued subject to the provisions of these articles, from which their authority is necessarily derived.

Section 5, Article 911a, provides that:

" . . . Any right, privilege, permit or certificate held, owned or obtained by any motor bus company under the provisions of this act, or owned or obtained by any assignee or transferee of any such motor bus company shall be taken and held subject to the right of the state at any time to limit, restrict or forbid the use of streets and highways of this state to any owner or holder of such right, privilege, permit or certificate."

A similar clause is contained in Article 911b, Section 5.

Section 4, (d) provides as follows:

"The Commission is further authorized and empowered to supervise and regulate motor bus companies in all other matters affecting the relationship between such motor bus companies and the traveling public that may be necessary to the efficient operation of this law."

Section 10 provides that:

"The Railroad Commission, in the event that it grants an application and issues a certificate, shall do so upon such terms and conditions as it may impose, *and subject to such rules and regulations as it may thereafter prescribe.*"

Similar provisions are contained in Article 911b.

Thus it may be seen that by the very act under which the Railroad Commission has authority to issue certificates of convenience and necessity in cases of this character, the state retains its control over the public highways; and every certificate heretofore issued has been subject to the right of the Commission to make subsequent rules and regulations with reference thereto; and it is provided (Section 10) that the Commission may suspend, revoke, alter or amend any certificate in the event of a violation, or refusal to obtain any of its proper orders, rates, fares, rules or regulations. If the Railroad Commission, which is a creature of the Legislature, has the right to make subsequent rules and regulations with reference to the performance of the things for which a certificate has been issued, then it is the opinion of this department that the Legislature itself would most certainly have that same power, especially in view of its undeniable right to make regulations with reference to intrastate commerce, and the express retention of such right by it in the act which provides the authority for the Railroad Commission to control transportation of this character.

A corporation is a creature of the law and none of its powers are original; and the state has the power to regulate and control foreign, as well as domestic corporations, in so far as intrastate affairs are

concerned. See *Waters-Pierce Oil Company vs. Texas* 177 U. S. 28, which is authority for the proposition that a state has the authority to legislate with reference to trusts and monopolies within its confines and such provision will be upheld in so far as intrastate commerce is concerned.

It has been suggested that the act under consideration is unconstitutional for the further reason that it is a denial of the equal protection of the laws as guaranteed by the Fourteenth Amendment of the United States Constitution. The guarantee provided by this section has reference to the laws and Constitution of the state concerned. *Nashville C. & St. L. Ry. Co. vs. Taylor* (C. C.), 86 Federal 168. The equal protection clause of the Fourteenth Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. *Lindsley vs. Natural Carbonic Gas Company*, 220 U. S. 61. It has been held that the inherent difference between corporations and natural persons is sufficient to sustain a classification making restrictions upon the right of non-residents to do business in the state, applicable to corporations alone. *Crescent Cotton Oil Company vs. Miss.* 257 U. S. 129. A classification is valid and constitutional if it is applicable to all similarly situated. *Tinsley vs. Anderson*, 171 U. S. 106.

It is our opinion that the classification made in this law, which singles out railroad companies and says that they shall not own any stock in a bus company, is a reasonable and not an arbitrary classification. It must be remembered that the "equal protection of the laws" spoken of has reference to the laws and Constitution of the State of Texas. The Constitution of Texas forbids monopolies. It provides that no railroad company shall control any other railroad company owning or having under its control a parallel or competing line, and it seems to us that the law in question is exactly in accordance with the spirit of this constitutional provision which makes it unlawful for a railroad company to own a control in a competing company. It is the opinion of this department that the Legislature can, in its discretion, constitutionally provide that the ownership by a railroad of any interest in a motor bus or motor freight company is against the public welfare and tends to create a monopoly.

It seems to us that the bill is valid for still another reason. Railroads are chartered solely for the purpose of constructing, maintaining and operating railroads, and may do incidentally only what is necessary to carry out such purpose and the things especially authorized by statute. So far as we know, there is no provision of the law which authorizes a railroad company to own or operate a bus or truck line. Certainly, railroads are not so authorized by their charters. A corporation including a railroad company has only power to do such acts as are authorized by its charter. *Railroad Co. vs. Morris*, 67 Texas 692, 4 S. W. 156. It seems to us that the acquisition by a railroad company of a controlling interest in a bus line is probably *ultra vires*. Hence, if railroad companies, by their charters, are not authorized to acquire such an interest, we do not think a valid com-

plaint can be raised as to a law which forbids their doing what they have never had the right to do.

The bill in question gives to railroad companies two years in which to rid themselves of any interest which they may now have in motor bus or motor freight lines. This seems to be a reasonable time for this to be done, and if the provision is reasonable, it is not invalid. In re: Seven Barrels of Wine (Fla.) 83 So. 627. Even if railroad companies had the right to acquire an interest in motor bus or motor freight lines operating in this state under a certificate of convenience and public necessity, as pointed out in the beginning, such interest was acquired expressly subject to the right of the state to control the highways, (which would be inherent whether retained or not), and also subject to any future rules or regulations which might be passed.

We hope that above opinion has given you the desired information, and assure you of our willingness to discuss the matter personally with you in the event we have not made ourselves clear.

Very truly yours,

MAURICE CHEEK,
Assistant Attorney General.

Op. No. 2859.

MOTOR CARRIERS—CONTRACT CARRIERS—PERMITS—TERRITORIAL RE-
STRICTIONS—LIMITATIONS UPON OWNERSHIP—DRIVERS’
LICENSE—INSURANCE—FILING FEES—INJUNCTIONS
—SALE AND TRANSFER

1. A person, firm or corporation may hold a contract carrier permit in one or more restricted areas of the State, which may be covered by a single application.
2. Contract carriers may not be required to set out anything further in their application than is required by Sec. 6, H. B. 335, Acts of the Forty-second Legislature.
3. Although a person, firm or corporation holding a Class “A” motor carrier certificate of necessity and convenience is prohibited by the terms of the Act from also holding a contract carrier permit, a person owning stock in such a corporation is not thereby prohibited from obtaining a contract carrier or special commodity permit.
4. A person now operating as a Class “B” carrier under the provisions of the old law, upon filing an application for a contract carrier permit, may continue to operate until such time as his application is heard and determined by the Commission.
5. Drivers’ license issued by the Commission for the operation of regulated trucks are issued for a period of one year and may be renewed on or before the anniversary date of the issuance of the original license.
6. Under the provisions of H. B. 335, Acts of the Forty-second Legislature, Section 13, the Commission may not waive the requirements of cargo insurance which is required by law upon every regulated truck, and it is required under the provisions of the law, after hearing and determining the class of service to be rendered, to fix the amount of cargo insurance in such an amount as will be reasonable in each case.
7. Every application for a contract carrier permit must be accompanied by the filing fee of \$10.00, provided the service desired to be rendered is to extend beyond the first of September, 1931.
8. There is no restriction provided by law as to the number of contracts which a contract carrier may hold, the only restriction in this con-

nection requiring such contract carrier to confine his operation so as not to make him a common carrier.

9. Either the Commission, the Attorney General, or any district or county attorney may apply for and obtain injunctive relief against any carrier violating any of the provisions of this act, or any rule, rate, order or regulation made by the Railroad Commission under the authority of this act, and a suit for penalties is not a condition precedent to relief by injunction.

10. The law specifically providing for the sale, assignment, transfer or lease of a Class "A" certificate of necessity and convenience thereby precludes any idea that a contract carrier or special commodity permit could be sold, assigned, transferred or leased, and such contract carrier, and special commodity permits may not, therefore, be sold, assigned, transferred or leased.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, June 25, 1931.

Railroad Commission of Texas, Austin, Texas.

Attention: Mr. Mark Marshall

GENTLEMEN: This will acknowledge your letters of June 18th and 19th, respectively, reading as follows:

"The Commission has instructed me to present to you some questions about which there might be two or more conclusions reached as to the construction to be placed on requirements under this statute, and your explanation of certain matters will be appreciated.

"1. Can a man, for instance, living in Corpus Christi, secure a contract carrier permit to haul in and around Corpus Christi, and in the same permit be given permission to haul from Dallas and vicinity to the ports; or shall he make application, setting out the roads he desires to traverse and the towns from which he proposes to haul to Corpus Christi, then, at a later date, make application for a permit to haul from certain communities around Dallas to the ports?

"2. Shall a contract carrier be required to set out in his application for a permit the names of the persons with whom he has contracts, and shall he specify what commodities he proposes to haul under the contracts?

"3. If a corporation holds a common carrier certificate, can an individual member of that corporation hold a contract carrier or special commodity permit; and can persons owning stock in the corporation form another corporation and obtain a contract carrier or special commodity permit?

"4. Can the holder of a special commodity permit haul any of the commodities specified under the statute under one permit, or shall he have a permit for each commodity he desires to handle?

"5. We have at this time Class "A" commodity certificates in force restricted to the hauling of cotton, can they, under the law, continue to operate under these certificates until September 1st, the taxes being paid up to that date and insurance in full force and effect?

"6. Shall a Class "B" operator, under the old law, continue to operate until September 1st, even though he does not expect to file an application as a common carrier or a special commodity carrier, or shall he discontinue his operation if he has not filed an application within thirty days from the effective date of the law?

"7. The section requiring the licensing of drivers states that license shall be issued to them for a period of one year, and on or before the anniversary of the issuance of the license, they shall procure a renewal of same. Can the Commission issue these for the fiscal year, or shall they issue them for one year from any date applied for?

"8. Is the Commission authorized under the statute to fix blanket requirements on the amount of insurance policies covering cargo to all operators, or shall they determine the amount of insurance to be carried by

"9. Shall a special commodity carrier and a contract carrier pay the ten dollars filing fee with their application?

"10. Should there be, under the law, any restrictions as to the number of contracts that a contract carrier may hold, and can he, after obtaining a contract carrier permit, make a contract for each separate day or each separate week or month, or may he make a contract following the expiration of another at will?

"11. Is the Commission authorized to ask for an injunction against any carrier without going through the Attorney General's Department?

"12. Would it be permissible, under the law, for a contract carrier, or special commodity carrier to sell and transfer their permits?"

"Section 6 of the recently enacted Motor Carrier Law provides in subdivision (A) that no motor carrier now operating as a contract carrier shall so operate until he shall have received a permit from the Commission.

"Does this mean a new applicant, or does it include those holding Class "B" permits and who have paid fees thereon to September 1, 1931?

"Section 7 of the same act provides that present Class "B" permit holders shall not be required to pay any additional vehicle fees for the year ending September 1, 1931, incidental to the issuance of permits required in this act.

"Please advise us whether or not in your opinion this law contemplates that the Railroad Commission must issue, without application or hearing, to all Class "B" permit holders who have paid all fees on their permits up to September 1, 1931, permits to operate as contract carriers for that period. Also advise if you so construe this law as to mean that these operators, if they desire to operate as contract carriers, shall file application for such permits within thirty days from the effective date of such law and if such applications are to be construed as for operations after September 1, 1931."

We will take up each question in the order in which it has been propounded in your letters, restating the question and letting our answer immediately follow.

"1. Can a man, for instance, living in Corpus Christi, secure a contract carrier permit to haul in and around Corpus Christi, and in the same permit be given permission to haul from Dallas and vicinity to the ports; or shall he make application, setting out the roads he desires to traverse and the towns from which he proposes to haul to Corpus Christi, then, at a later date, make application for a permit to haul from certain communities around Dallas to the ports?"

You are advised that any persons, firm or corporation, in making application for a permit to operate as a contract carrier under the provisions of H. B. 335, is governed in his application by Sections 6-A, 6-B, and 6-C of the law, and among these provisions is found Section 6 (B-2), which is as follows, to-wit:

"The application shall set forth the nature of the transportation in which the applicant wishes to engage stating substantially the territory to be covered by the operation and including the condition and character of the roads over which the transportation is to be performed."

From this section you will observe that the application should set forth the nature of the transportation in which the applicant wishes to engage, stating substantially the territory to be covered by the operation, and from this provision and the other provisions relating to contract carriers, it seems clear that any person may make application to operate as a contract carrier in any particular territory, or in any number of groups of particular territories, which he may desire, as,

for instance, in your question, he may in the same application apply for a permit to operate a contract carrier service in and around Corpus Christi, and in and around the city of Dallas, or from Dallas and surrounding communities, to the Gulf ports.

Of course, in order to obtain such permit from the Commission, it would be necessary for such applicant to prove with the same certainty the necessity for such service in one community as in another.

There is nothing whatsoever in the law which would restrict a contract carrier in his operation to one particular portion of the State, and if he wished to operate in more than one particular portion, then, he would be able to do so, and there is nothing in the law which would require him to make a separate application to cover each separate portion of the state in which he wishes to operate.

Your question seems to imply that the designation of the territory should be by towns which the applicant desires to serve, but your attention is called to the fact that any designation which would substantially define the territory to be covered by the operation would be sufficient, as, for instance, a designation by counties, or a designation of within a particular radius or a particular base. Of course, however the territory may be defined, the applicant would be required to show the character of roads over which the transportation is to be performed.

"2. Shall a contract carrier be required to set out in his application for a permit the names of the persons with whom he has contracts, and shall he specify what commodities he proposes to haul under the contracts?"

You are advised that the law does not require an applicant for a contract carrier's permit to set out the names of the persons with whom he has contracts.

Section 6, with its several subdivisions, specifies what the application shall contain, and the Commission may not require anything further in the application than is specifically set out and required by the provisions of this act. By prescribing exactly what the application should contain, the law precluded the Commission from making other requirements.

"3. If a corporation holds a common Carrier Certificate, can an individual member of that corporation hold a contract carrier or special commodity permit; and can persons owning stock in the corporation from another corporation and obtain a contract carrier or special commodity permit?"

A Corporation is a separate, distinct legal entity from any member of the corporation; in fact, corporations do not have members, it is a legal entity, and the mere fact that some person holds stock in the corporation does not make him a member of the corporation in the sense in which you are using that term. Any individual could, therefore, whether he is a stockholder in a corporation owning and operating a common carrier certificate or not, hold a contract carrier or special commodity permit.

In answer to the last portion of this question, you are advised that persons are free to subscribe to the stock of any corporation, and that

they could, therefore, form any other corporation and own, hold control and operate a contract carrier or special commodity permit.

"4. Can the holder of a special commodity permit haul any of the commodities specified under the statute under one permit, or shall he have a permit for each commodity he desires to handle?"

Special commodity permits are governed by Section 6-D, as follows:

"The Railroad Commission is hereby given authority to issue upon application to those persons who desire to engage in the business of transporting for hire over the highways of this State live stock, mohair, wool, milk, live stock, feed stuffs, household goods, oil field equipment, timber when in its natural state, farm machinery and grain special permits upon such terms, conditions and restrictions as the Railroad Commission may deem proper, and to make rules and regulations governing such operations keeping in mind the protection of the highways and the safety of the traveling public; provided that if this Act or any section, subsection, sentence, clause or phrase thereof, is held unconstitutional and invalid by reason of the inclusion of this Sub-section, the Legislature hereby declares that it would have passed this Act and any such section, subsection, sentence, clause or phrase thereof without this subsection."

By the special provisions of this portion of the statute, the Railroad Commission is given authority to make rules and regulations governing the operation of special commodity permits, keeping in mind the protection of the highways and the safety of the traveling public. Whether or not the holder of a special commodity permit could haul any of the commodities specified in Sec. 6-D would, therefore, depend entirely upon the application which was made to the Commission, and the Commission's order thereon.

For instance, an application might be to engage in business of transporting for hire, etc., mohair, wool and milk, and if the Commission saw fit to issue the special permit for the transportation of all of these commodities, then the holder of the permit would be able to carry those commodities but no others. You will see, therefore, that what commodities the holder of a special commodity permit may carry would depend upon what commodities he applied for permission to carry and what commodities the Commission determine in its order he should carry, and under that rule he might carry any or all of the commodities mentioned in the statute, or he may be limited to such articles as is therein named and as may be determined by the Commission.

"5. We have at this time Class "A" commodity certificates in force restricted to the hauling of cotton, can they, under the law, continue to operate under these certificates until September 1st, the taxes being paid up to that date and insurance in full force and effect?"

You are advised that all outstanding temporary Class "A" commodity certificates, outstanding upon the effective date of House Bill No. 335, would, by force of law, become inoperative, null and void, and that such certificates are no longer of any force or effect.

"6. Shall a Class "B" operator, under the old law, continue to operate until September 1st, even though he does not expect to file an application as a common carrier or a special commodity carrier, or shall he discontinue his operation if he has not filed an application within thirty days from the effective date of the law?"

You are advised that under House Bill No. 335 all Class "B" permits will automatically expire by operation of law thirty days from the effective date of this new law, unless within said time such Class "B" operators have filed their applications for permits as contract or special commodity carriers.

"7. The section requiring the licensing of drivers states that licenses shall be issued to them for a period of one year, and on or before the anniversary of the issuance of the license, they shall procure a renewal of same. Can the Commission issue these for the fiscal year, or shall they issue them for one year from any date applied for?"

The section relating to the licensing of drivers is found in Section 4-B, a portion thereof reading as follows, to-wit:

"* * * provided that every driver aforesaid shall acquire a driver's license within thirty (30) days after this Act takes effect and shall annually thereafter on or before the anniversary of the date of the original license acquire a renewal thereof. Such license issued shall be for a term of one year."

You will note from this provision of the law that it uses the words "shall annually thereafter on or before the anniversary." From this part of the statute relating to the licensing of drivers, it seems to be clearly evident that licenses are issued for the period of one year and are to be renewed on or before the anniversary date of the original license. The language used precludes any idea that these licenses may be issued for a fiscal year.

You are advised that the fiscal year does not enter into consideration in the issuance of drivers' license, but that said license when issued are for the period of one year except when issued under the provision of the law relating to temporary license, and that they are to be renewed on or before one year from the date of the original license.

"8. Is the Commission authorized under the statute to fix blanket requirements on the amount of insurance policies covering cargo to all operators, or shall they determine the amount of insurance to be carried by the average value of the cargo to be hauled?"

That portion of the statutes relating to the fixing of the amount of the cargo insurance to be carried by motor carriers is contained in Section 13, a portion of the language of said section reading as follows:

"Provided, however, that the Commission shall not require insurance covering loss of or damage to cargo in amount excessive for the class of service to be rendered by any motor carrier."

It seems from the language here used that the fixing by the Commission of a blanket requirement on the amount of insurance policy would not meet the requirements of the law. It seems clearly evident that the plain intent of the law was that when these applications are heard, and when the Commission has determined the class of service to be rendered, that at that time they should also fix the amount of insurance to be required of that particular carrier, fixing said amount in such sum as not to be excessive for the character of service which it is developed upon the hearing would be rendered.

While from a practical standpoint it might be more convenient to provide blanket amounts, yet a strict interpretation of the law will require the fixing of amounts in each individual case, and after a blanket amount is fixed, the Commission should not hesitate when the requirements of any particular service may justify it to vary said amount in order to comply with the provisions of the law.

Every motor carrier must carry cargo insurance.

"9. Shall a special commodity carrier and a contract carrier pay the ten dollars filing fee with their application?"

Section 7 provides:

"For the purpose of defraying the expenses of administering this act every motor carrier operating as a contract carrier shall, at the time of the issuance of a permit to him and annually thereafter on or between September 1st and September 15th of each calendar year pay a special fee of Ten (\$10.00) dollars for each motor vehicle operated or to be operated by such motor carrier. If the permit herein referred to is issued after the month of September of any year the fee paid shall be prorated to the remaining portion of the year ending August 31st following, but in no case less than one-fourth ($\frac{1}{4}$) the annual fee. Provided that no person now authorized by law to operate as a Class "A" or Class "B" motor carrier, and who has paid annual vehicle fees required by law of the holders of certificates or permits for the year ending September 1, 1931, shall be required to pay any additional vehicle fees or additional fees incident to the issuance of certificates or permits required in this act, for the year ending September 1, 1931, in lieu of those now required by law. Every application for a permit shall be accompanied by a filing fee in the sum of Ten (\$10.00) Dollars which fee shall be in addition to the other fees and taxes and shall be retained by the Commission whether the permit be granted or not."

Special attention is directed to that part of the above quoted section which reads:

"Provided that no person now authorized by law to operate as a Class "A" or Class "B" motor carrier, and who has paid annual vehicle fees required by law of the holders of certificates of permits for the year ending September 1, 1931, shall be required to pay any additional vehicle fees or *additional Fees incident to the issuance of certificates or permits* required in this Act, for the year ending September 1, 1931, in lieu of those now required by law."

You will especially notice the limitation "for the year ending September 1, 1931," and by referring to the original quoted section, the general provision requiring every application to be accompanied by a filing fee. The controlling feature here seems to be that if the application contemplates a service beyond the first of September, 1931, then the application must be accompanied by the filing fee of \$10.00. The exception was a protection to those holding permits from the payment of additional fees only to September 1, 1931.

You are therefore advised that every application for a permit must be accompanied by the required filing fee of \$10.00.

"10. Should there be, under the law, any restrictions as to the number of contracts that a contract carrier may hold, and can he, after obtaining a contract carrier permit, make a contract for each separate day, or each separate week or month, or may he make a contract following the expiration of another at will?"

There can be no restriction on the number of contracts that a contract carrier may hold. After obtaining a contract carrier permit, he may make such contracts as he may wish.

The only limitation upon a contract carrier is that he must operate in such a way as to remain a contract carrier and not place himself in a position which would make him a common carrier, for once he becomes a common carrier he would be required to have a Class "A" certificate.

The term "common carrier" has been variously defined, and without attempting a technical definition thereof, it is here now pointed out that the distinguishing characteristic of a common carrier seems to be that a common carrier hold itself out as being ready, able and willing to carry for all of the public generally.

"11. Is the Commission authorized to ask for an injunction against any carrier without going through the Attorney General's Department?"

Section 16-C provides, among other things, that:

"Such injunctive relief may be granted upon the application of the Commission, the Attorney General, or any district or county attorney."

From this, it will be observed that the Commission may ask for an injunction without going through the Attorney General's Department, such application being made through any district or county attorney, or it may obtain such relief acting through the Attorney General, and that the Attorney General or any district or county attorney might also obtain such injunctive relief without a request therefor or without acting under the direction of the Railroad Commission.

"12. Would it be permissible, under the law, for a contract carrier or special commodity carrier to sell and transfer their permits?"

A portion of Section 5 reads:

"Any certificate held, owned or obtained by any motor carrier operating as a common carrier under the provisions of this Act may be sold, assigned, leased, transferred or inherited; * * *."

The general rules of statutory construction would here apply, and this statute having especially provided that certificates may be sold, assigned, leased, transferred or inherited, and making no such provision as to contract carrier permits, it must be held that contract carrier permits or special commodity permits cannot be so sold, assigned, leased, transferred or inherited.

With reference to the first question in your letter of the 19th, quoted hereinabove, the question pertains to Subdivision "A" of Section 6, and you are advised that this subdivision relates to a new applicant; that is, one not now holding a Class "B" permit, and such new applicant is not permitted, under the terms of the law, to begin operation until his application has been heard and determined by the Commission.

The second question contained in your letter of the 19th is as follows:

"Please advise us whether or not in your opinion this law contemplates that the Railroad Commission must issue, without application or hearing,

to all Class "B" permit holders who have paid all fees on their permits up to September 1, 1931, permits to operate as contract carriers for that period."

In answer to this question you are advised that no contract carrier permit can be issued without application and hearing.

This law does provide that those holding Class "A" certificates of convenience and necessity shall be issued new certificates without application or hearing, but it specifically provides in Section 6-C that all applications for contract carrier certificates shall be heard and determined by the Commission before permit is issued.

The last question of your letter of the 19th follows:

"Also advise if you so construe this law as to mean that these operators, if they desire to operate as contract carriers, shall file application for such permits within thirty days from the effective date of such law and if such applications are to be construed as for operations after September 1, 1931."

This question seems to relate, according to your letter, to Section 7, but it also seems that the proper answer thereto is found in Section 6-C, which provides as follows:

"* * * provided, however, any person now lawfully operating on a Class "B" operator in this State who may desire to continue in the business of a motor carrier shall file an application for a permit or certificate under the terms of this Act within thirty (30) days after the effective date hereof and it shall be the duty of the Commission to determine such applications forthwith, and such applicants may, subject to the provisions of this Act and to the orders, rules, rates and regulations of the Commission *continue to operate as motor carriers pending the determination by the Commission to such application.*"

You will see, therefore, that those who are now operating a Class "B" service under the old law, upon the filing of an application under the provisions of Section 6 of the new law, would be entitled to have their application heard and determined forthwith, but that this application would entitle them to continue to operate as motor carriers pending the determination, or, in other words, until such time as the Commission had heard the application and had either granted or denied the application. Upon the denial of any such application, of course, such operator must cease operation immediately or else his operation would constitute a violation of the law.

Very truly yours,

T. S. CHRISTOPHER,
Assistant Attorney General.

Op. No. 2866.

STATUTES—CONSTRUCTION—HOUSE BILL 336—VESTED RIGHTS—
LICENSEES.

1. The licensing of a motor vehicle under existing laws, confers no vested right in the operator of a motor vehicle in the use of the highways of the State.

2. The use of the highways for the transportation of property is an extra-ordinary use, subject to the proper police regulation of the State at

will, and the license of an operator in the use of such highways may be cancelled, revoked or even prohibited at will.

3. The provisions of House Bill 336 as to length, width and height, and all of the other provisions thereof except as to the weight of the load, are effective from and after the effective date of the bill, to-wit: August 22, 1931.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, August 10, 1931.

Mr. Jesse E. Martin, District Attorney, Fort Worth, Texas.

DEAR SIR: This will acknowledge yours of the 21st, relating to House Bill No. 336, in which you propose the following questions for consideration of this department:

1. "The Legislature having knowledge at the time of the passage of said Act that all motor vehicles operating on the highways and comprehended within the terms thereof, whether *oversize* or carrying *overweight* loads within the meaning of said Act, were licensed to so operate during the year 1931, did it intend to exclude from the operation of said Act to January 1, 1932, not only such vehicles with respect to weight of load carried, but such as are *oversize* or *overlength* as well? Should not the same reservation as applied to *weight of load* to be carried by such equipment be read into said Act and applied to *overlength* and *oversize* equipment so as to limit the application thereof as to such equipment to January 1, 1932, in order to give the owners thereof time to dispose of such equipment?"

2. "Did the Legislature intend, by the passage of said Act, to make one amenable thereto and subject to prosecution; by operating on the highways after said law becomes effective, motor vehicles or combinations thereof, when the size and length thereof exceed the size and length prescribed by said Act, without limitation as to the *weight or load* that may be carried until January 1, 1932?"

3. "By procuring the license required by the existing law for operation of *oversize* and *overlength* motor vehicles on the highways for the year 1931, did the holders of such license acquire a vested right to operate such vehicles during the term mentioned regardless of the Act in question?"

The registration laws are found in Article 6675a, Revised Civil Statutes of 1925, which is an act of the Forty-first Legislature, Second Called Session, page 172, Chapter 88, and by virtue of the provisions of Chapter 42, page 72, General Laws of the Second Called Session of the Forty-first Legislature, the loads of vehicles are placed within certain prescribed limits.

The load limit is a police regulation of the State and it seems that a correct solution of these questions depends upon the power of the Legislature over the highways and its authority to make such regulations as may be necessary for the safety of the highways, together with their preservation; in other words, the proper exercise of their police authority over the highways.

The control of the highways is primarily a State duty, to be taken in immediate charge at will through its own agents. *Athens vs. Kansas*, 191 U. S. 207; *Barney vs. Keokuk*, 94 U. S. 324. This language of the Court and these cases are cited in the case of *State vs. Cumming*, 172 S. W. 290 (Supreme Court of Tennessee). It would seem, therefore, that any proper police regulation might be exercised by the Legislature at will.

In the case of *Packard vs. Banton*, 264 U. S. 140, the Supreme

Court of the United States has said that the streets and highways belong to the public and are primarily for the use of the public in its ordinary use.

This brings us to the thought that a regulation such as the one involved may properly bring before us for consideration the use of the streets or highways themselves. Of course, this law does not have application to the streets of incorporated cities or towns. It is said in the Packard case, *supra*, that where the purpose of the use of a highway is that of gain, that the purpose is a special and extraordinary use, and generally, at least, may be prohibited or conditioned as the Legislature deems proper. From this language of the Court, it seems clear that the operators of commercial motor vehicles and, in our opinion, the operators of all trucks who are moving property over the highways of this State for the purpose of gain, are exercising an extraordinary or special use of the highways, which may be prohibited or conditioned as the Legislature may see fit and proper and at any time.

The highways belong to the State and their use in other ways than the ordinary and common mode and method of use is a license which may be regulated, controlled or even prohibited under a proper exercise of the police power of the State.

The State has the right to legislate in the interest of the public health, public safety and public morals. There can be no question of the right of the Legislature in the exercise of the police power to regulate the driving of automobiles and motorcycles on the public highways of the State. *City of Newport vs. Merkel Bros. Co.*, 161 S. W. 549.

The case of *Buck vs. Kuykendall*, an opinion by Justice Brandies of the Supreme Court of the United States, 267 U. S. 307, bears to some extent, we think, upon the proposition under consideration, and in the course of that opinion we find the following language :

"A citizen may have, under the Fourteenth Amendment, the right to travel and transport his property upon them by auto vehicle, but he has no right to make the highways his place of business by using them as a common carrier for hire. Such use is a privilege which may be granted or withheld by the State in its discretion without violating either the due process clause or the equal protection clause."

Citing *Packard vs. Banton*, *supra*, the use and operation of trucks upon the highways of this State, whether they be for hire or in the ordinary methods, the transportation of property is an extraordinary use. It is not the accustomed and accepted mode or use of the highways. There is no direct authority upon this point as relates to others than those who use the highways for compensation or hire, but somewhere between the right of the ordinary citizen to use the highways as a means of travel stands all those operators who are using trucks to transport property and the operator of a common carrier for hire, and we have become convinced, as we have already said herein, that these operators stand in the same relation to the use of the highways as a common carrier for hire. In other words, that their use of the highways is a special privilege and an extraordinary use.

If these premises be correct, then the use of the highways for the

operation of trucks under the regulation imposed by House Bill 336 does not and cannot carry with it any vested right in the use of the highways. Rather than the operators of these trucks having any vested right in the use of the highways for the purposes for which they are using them, they are merely licensees using the property of the State at its will and sufferance subject to a prohibition against such use at any time and this clearly distinguishes the case which you have cited relating to a vested right, to-wit: the case of *Invader Oil & Refining Company of Texas vs. City of Fort Worth*, 229 S. W. 616, the distinction being a vested right to the use of property as against its use as a mere licensee.

In considering this question, it is interesting at least to note the case of *Morris vs. Doby*, 274 U. S. 135, an opinion by Chief Justice Taft. This case arose in the State of Oregon and came about due to the fact that the Highway Commission of the State of Oregon, under the authority conferred upon it by statute, reduced the gross weight of a load from 22,000 pounds down to 16,500 pounds. The case was carried to the Supreme Court of Oregon and thence to the United States Supreme Court. The case did not directly raise the question which we have before us for consideration, but the Court held that such a regulation was a proper police regulation and, therefore, a valid one. It seems clear, therefore, from this indication, that the regulations imposed, at least as to the weight, in House Bill 336 are a proper police regulation.

As we say, no question of a vested right entered into the consideration of this case, but it is not very highly probable that had there been any credence given to such a theory or to any other theory than that the use of the highways in the manner in which they are used by trucks was that of a mere licensee, that the question of a vested right would have been raised? It seems clear that such use of the highways carries with it no vested right whatsoever and that primarily such use is that of a licensee only.

With this discussion of these features of the question in mind, we come directly to answer the propositions submitted, and, we think that the terms and provisions of this statute relating to **oversize, overlength, height, etc.**, of vehicles is operative immediately upon the taking effect of the law, to-wit, on August 22. We do not believe that the same reservation applies to this particular case as applied to the weight of a load. That is clearly the intention of the Legislature, apparently supported by authority and a regulation which properly may be made.

Your second question has, therefore, been answered in answering the first, and the answer is, that the Legislature did intend, by the passage of this act, to make one amenable to the provisions of the act and subject to prosecution for the violation thereof in all respects except as to the load limit, which does not become effective until January 1, 1932.

In answer to your third question, as to whether or not operators secured by a vested right in the highways by licensing their oversize and overlength vehicles under existing laws, you are advised that it

is our opinion that such persons operating such equipment obtained no such vested right; that such operators are operating as licensees over the highways of the State, which licenses may be revoked, cancelled or prohibited at the will of the Legislature.

Very truly yours,

T. S. CHRISTOPHER,
Assistant Attorney General.

OPINIONS RELATING TO PUBLIC LANDS

Op. No. 2834.

WHAT ARE SURVEYED LANDS WITHIN THE MEANING OF THE PERMIT STATUTE? WHAT IS AN INTERVENING RIGHT?

MAY LANDS FORFEITED AND ON WHICH A SUBSEQUENT OIL AND GAS PERMIT IS GRANTED BE SOLD TO A THIRD PERSON

1. Surveyed lands within the meaning of the oil and gas permit law include all surveys for which there are approved field notes on file in the land office, and eighty (80) acre tracts and the multiples thereof out of such surveys.

2. An oil and gas permit regularly issued to an applicant who has fully complied with all statutory requirements constitutes an intervening right within the meaning of Article 5326, Revised Civil Statutes, authorizing reinstatement of forfeited sale of lands, provided "no rights of third persons may have intervened."

3. When an intervening oil and gas permit prevents the reinstatement of a forfeited sale, the land may be sold to an applicant to purchase but the purchaser will get no interest in the oil and gas unless and until the permit is forfeited.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, February 18, 1931.

Hon. J. H. Walker, Land Commissioner, Austin, Texas.

DEAR SIR: We have your letter of February 11th, which reads as follows:

"On the second of September 1921, Paul W. Curtis purchased the W. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of Section 14 Block A43 Public School Land in Andrews County under mineral classification. The land was forfeited for non-payment of interest September 22, 1925.

"On March 28, 1929 Permit No. 14308 to prospect the area for oil and gas was issued to Theo W. Carter who has combined it with another permit giving the two an average date of August 31, 1929, the combination having been filed in this office August 25, 1930, and second year rental was paid March 7, 1930.

"On August 28, 1930, Paul W. Curtis paid the accrued interest on his purchase of the land and demanded a reinstatement.

"The land having been advertised to go on the market September 1, 1930, E. M. Rogers of Arlington, Texas, filed his application in this office to purchase the land at \$116.00 an acre, and filed the required first payment and executed his obligation for the deferred payment.

"It is contended in behalf of Mr. Curtis that the area is not surveyed land in the meaning of the statute providing for the issuance of permits (Kuykendall vs. Spiller 299 SWR 522) and if the permit was legally issued the land should be reinstated because of the mineral classification and requirement of no rights by Mr. Curtis to the minerals. In other words, the permit is not an obstacle. This matter was submitted to the Attorney General's office August 28, 1930, but in some way it has been side-tracked. My understanding is that Black and Graves and perhaps others filed briefs with the Attorney General.

"Will you kindly advise me whether the department should reinstate the sale on Mr. Curtis' application, or set aside his application and award the land to Mr. Rogers, or if neither of these is the proper step, advise me what to do?"

Article 5348, Revised Civil Statutes of 1925, provide, among other things, as follows:

“. . . Surveyed lands within the meaning of this law shall include all tracts for which there are approved field notes on file in the Land Office and eighty acre tracts and multiples thereof of such surveys.

“Unsurveyed areas within the meaning of this law shall include all areas for which there are no approved field notes on file in the General Land Office.

“All applications for surveyed land shall be filed with the clerk of the county in which the tract or a portion thereof is situated, or with the clerk of the county to which such county may be attached for judicial purposes and shall be filed in the Land Office within thirty days after it was filed with the county clerk.

“. . . Whole tracts of surveyed lands may be applied for as a whole or in eighty acre tracts or multiples thereof without furnishing field notes therefor. . . .”

The statute seems clear as to what is considered to be surveyed land. In the case of *Kuykendall vs. Spiller*, 299 S. W. 522, the commission of appeals held that the tract of one hundred sixty (160) acres claimed by Spiller as surveyed lands was not in fact surveyed lands within the meaning of this statute, however, in that case the facts disclose that the entire survey had an excess of approximately one hundred sixty (160) acres, and Spiller's intention was to get an oil and gas permit on the excess acreage, which did not, under the facts, constitute a regular subdivision of the section, as sections of six hundred forty (640) acres each are usually divided into tracts of eighty (80) acres and multiples thereof. As we understand your letter, the tract about which you inquire is an eighty (80) acre subdivision of the regular surveyed section of land. If such is a fact, then the eighty (80) acre tract is surveyed land within the meaning of the statute.

An oil and gas permit to become an intervening right such as will prevent the reinstatement of a forfeited purchase must have been issued to an applicant who has fully complied with all statutory regulations and must be a valid permit maintainable in law at the time the original purchaser makes his application to have his forfeited purchase reinstated. Article 5326, Revised Civil Statutes of 1925, is the same as the act of 1897, chapter 129, page 185. Since a time soon after this act was originally passed, the Supreme Court has declared that the provision for reinstatement of forfeited sale should be interpreted with the utmost liberality in favor of the former owner seeking reinstatement of his purchase. In so construing the statute the court declared that in order for an intervening right to defeat reinstatement it must be a vested right enforceable in a court proceeding. *Anderson vs. Neighbors*, 59 S. W. 534. *Mound Oil Company vs. Terrell*, 92 S. W. 451. *Gulf Production Company vs. State* (Civil appeals but writ of error denied), 231 S. W. 124. *Cruzan vs. Walker*, 26 S. W. (2d) 908. In the case of *Huggins vs. Robinson*, 10 S. W. (2d) 710, the commission of appeals held that an oil and gas permit was an intervening right preventing the reinstatement of forfeited purchase. In that case, however, the original purchase was without mineral reservation so that it is not exactly in point in this case. However, since it would be impossible to put the original purchaser

in the same position he was in under his purchase without a forfeiture of the oil and gas permit the oil and gas permit is evidently an intervening right within the meaning of the statute. It appears to us, however, that it would be well to scrutinize very carefully the rights of the permit holder to be sure that he has a permit that he could enforce in court, for unless his permit is maintainable in court the original purchaser is entitled to have his purchase reinstated.

It naturally follows from what we have said above that if the oil and gas permit held by Theo. W. Carter is a valid permit so that it prevents the reinstatement of the forfeited sale, then the land becomes subject to sale to a third party, and E. M. Rogers, if he has complied with the statutory requirements, would be entitled to an award on his application dated September 1, 1930. We call your attention to the fact, however, that under Article 5373, Revised Civil Statutes of 1925, Rogers would not acquire any rights to any of the oil and gas in the land unless and until the permit held by Carter has forfeited.

Very truly yours,
 GEO. T. WILSON,
 Assistant Attorney General.

Op. No. 2849

LAND—COUNTY LANDS—COMMISSIONERS' COURT—LEASE BY—OIL AND GAS LEASE OF COUNTY FARM—PROCEDURE IN MAKING OIL AND GAS LEASE ON COUNTY LAND

1. The county commissioners' court in Texas is a creature of the State Constitution and has only such authority as is expressly or impliedly conferred by the Constitution and the laws enacted in pursuance thereto.

2. Commissioners' court is authorized to lease county farm for oil and gas purposes.

3. Commissioners' court is authorized by Article 1577 of 1925 Revised Civil Statutes to sell any real estate belonging to the county, an oil and gas lease in Texas is a sale of oil and gas in place, and the power to sell the entire county farm carries with it the power to sell the minerals thereunder separately from the surface.

4. Sales of real estate belonging to a county must be at public auction by a commissioner appointed by the commissioners' court.

5. The auction sale must be preceded by due notice to the public thereof, and this department recommends that said notice be given by advertisement in the same mode as that prescribed by Article 3808 for judicial sales.

6. The commissioners' court has power to confirm or reject any sale made by a special commissioner, and its action thereon should be evidenced by an order entered in the minutes of the court.

OFFICES OF THE ATTORNEY GENERAL,
 AUSTIN, TEXAS, April 29, 1931.

Hon. W. C. Dowdy, County Attorney, Collin County, McKinney, Texas.

DEAR SIR: The Attorney General is in receipt of your inquiry of April 22nd, reading as follows:

"Collin County owns in fee simple about 640 acres of land constituting its county farm.

"Please advise me whether the commissioners' court of Collin County,, Texas, is vested with power to lease said county farm for oil and gas purposes. If so what would be the correct procedure in leasing the said county farm.

"My opinion is that the commissioners' court has no such authority.

"I cite as authorities on this opinion the following:

"Biennial Report of Attorney General: 1918-1920 page 131 and page 687. 1924-1926, page 183. 1926-1928, page 410."

(1) The county commissioners' courts in this state are created by the Constitution of 1876, (Article V, Sections 1 and 18) Their powers are limited and controlled by the Constitution and the laws passed by the Legislature pursuant thereto. They have only such powers as are affirmatively or impliedly granted them by the Constitution and Legislature. *Bland vs. Orr*, 90 Texas 492; *Von Rosenberg vs. Lovett*, 173 S. W. 508 (Writ of error refused).

While it is well settled that counties have only such powers as are affirmatively and by necessary implication granted them by law, yet, once authority is vested in them, a reasonable construction of that authority will be given to effect its purpose. *Commissioners' court of Madison County vs. Wallace*, 118 Texas 279, 15 S. W. (2d) 535.

It is also well settled in this state that counties as bodies politic and corporate and as political subdivisions of the state may take title to and enjoy real estate without limitation as to the purpose for which it shall be used, so long as such use is not detrimental to the public welfare. *Scalf vs. Collin County*, 80 Texas 514, 16 S. W. 314, *Milam County vs. Bateman*, 54 Texas 153; *Bell County vs. Alexander*, 22 Texas 350, 73 Am. Decision 268. Counties, both by the Constitution and by statute, are amply authorized to establish and maintain county poor houses and poor farms. Constitution, Article II Section 2, Article 16 Section 8; Revised Civil Statutes, Articles 718 and 2351.

(2, 3) Article 1577 of the 1925 Revised Civil Statutes of Texas is as follows:

"The commissioners' court may by an order to be entered on its minutes, appoint a commissioner to sell and dispose of any real estate of the county at public auction. The deed of such commissioner, made in conformity to such order for and in behalf of the county duly acknowledged and proven and recorded shall be sufficient to convey to the purchasers all the right, title and interest and estate which the county may have in and to the premises to be conveyed. Nothing contained in this article shall authorize any commissioners' court to dispose of any lands given, donated or granted to such county for the purpose of education in any other manner than shall be directed by law."

This article, with slight changes, is as old as the state itself; it is Section 9 of an act pertaining to counties and their powers, enacted by the First Legislature of the State of Texas, passed May 11th, 1846. (2 Gammels' Laws of Texas 1628).

It will be noted that the power of sale granted by this article is very broad, the county, in the mode prescribed, may dispose of any real estate owned by the county. "Any" means "one or some, however great or small in number or quantity." (*Websters' International Dictionary*). No limitation is placed upon the power of

sale to be exercised by the commissioners court, in so far as quantity is concerned. Your county commissioners' court may, in the exercise of its discretion, sell the entire farm of 640 acres, or it may if it deems to the best interest of the county, sell 80 acres, 320 acres, or any other part thereof. The power to sell the whole carries with it the power to sell a part of said farm. We have found no decision of this department, or of any court of this state, which directly passes upon the question raised by you. Neither do we regard as determinative of this question the four former opinions of this department cited in your communication. Opinion No. 2114, page 131, Reports 1918-1920, is a case of lease of a portion of the court house square for five years for the erection of an oil station and cold drink stand. That was an ordinary lease as that term was understood as common law, and the opinion correctly states that it would be inconsistent with the public purposes with which a court house square is impressed to permit filling stations and cold drink stands to be erected thereon. Such businesses are inconsistent with public use of such squares, and the same would be true of any other private business attempted to be established thereon.

Opinion No. 1990, page 687, Reports 1918-1920, and Opinion No. 2649, page 183, Reports 1924-1926 both hold that the commissioners' courts have no power to lease public highways for oil and gas purposes. Those opinions are correct on several grounds, but are inapplicable to the fact situation now presented. The obstruction of a public highway is a violation of the Penal Code, to title to public highways is in the state, though taken in the name of the county, such use would be dangerous to the traveling public and destructive of free intercourse by the most common vehicle of travel now used in America, and public highways belong to the public and any structure which encroaches thereon is a nuisance per se, all of which was held in *Boone vs. Clark*, 214 S. W. 607, (writ of error refused). The very nature of a highway, built as it is for free trade and intercourse, renders wholly incompatible the use of the same for oil drilling purposes. This department, by Opinion No. 2680, page 410, Reports 1926-1928, held that a county commissioners' court had no power to lease a county hospital for a period of five years to a private organization. That was a correct ruling, and though the opinion fails to so state, what was really involved was an attempted delegation of one of the counties' governmental functions. It is axiomatic that it cannot contract away its sovereign powers and duties; the same ruling would apply in case the county attempted to contract with one to take over, for a stated stipulation, its duties and rights with regard to its other wards, such as prisoners and the poor. There is an important distinction in the power to sell a parcel of real estate upon which the poor farm happens to be situated at the time, and the power to contract by lease for five years with a private organization, to take over the entire functions of caring for the poor, including the upkeep, management, admission and discharge from such institution. The latter action would be an attempted delegation of a governmental function, the former would be but an incident in its efficient exercise.

Article 1577 authorizes the sale of any real estate. As above stated, this includes the power to sell an entire tract, or any part thereof. An oil and gas lease in Texas is not a "lease" as that term is used in common law conveyance. It has been established by repeated decisions of the Supreme Court of this State that the Lessee in an oil and gas lease acquires title to the oil and gas in place, a defeasible title in fee to the oil and gas in the ground. *Texas Company vs. Daugherty*, 107 Texas 226; *Stephens County vs. Mid-Kansas Oil and Gas Company*, 113 Texas 160; *Humphreys-Mexia Co., vs. Gammon*, 113 Texas 255; *W. T. Waggoner Estate vs. Sigler Oil Co.*, 118 Texas 509. In the latter case Justice Greenwood, in delivering the opinion of the court, said, (p. 517)

"such a writing as that here called a lease operated to invest the party called lessee and his assigns with title to oil and gas in place."

It is significant that our Supreme Court does not itself call the oil and gas lease a "lease," but in the opening paragraph of the opinion just quoted from designates the writing called a "lease," "a conveyance of oil and gas." (118 Tex., 515). When your commissioners' court authorizes the execution of an oil and gas "lease" on your county farm, it is not authorizing the execution of a "lease" in the legal sense, but is authorizing the execution of what Justice Greenwood terms a "conveyance of oil and gas." Your commissioners' court has undisputed authority to sell your county farm, and this department holds that it has authority to sell the oil and gas thereunder separately from the surface, and the conveyance may be in the usual form of such conveyances, even though it be commonly termed an "oil and gas lease." The Supreme Court of this state has expressly held that the commissioners' court may lease county school lands for oil and gas purposes (*Ehlinger, County Judge vs. Clark*, 117 Texas 547), and though said court has statutory authority to either sell or lease county school lands, it is significant that the Supreme Court treated the oil and gas lease as a conveyance or sale of the minerals (117 Texas 547, at 557), and upheld that transaction upon that basis. See also Opinion No. 2813, page 194, Attorney General Reports 1928-1930. The case of *Ehlinger vs. Clark* is also authority for the statement that the oil and gas lease may be made for cash, or part cash and part credit, and with reservation of a one-eighth (or other part) of the oil and gas as royalty.

(4) Having answered your first inquiry concerning the authority of the commissioners' court to make such oil and gas lease, we now take up the question of the correct procedure to be followed in making such conveyance. All the statutory authority and direction is contained in the above quoted article (1577), this not being a case of disposition of school land. You will note that the statute provides that the commissioners' court *may* appoint a commissioner to sell and dispose of real estate at public auction. The word "may" is usually interpreted to be permissive only, and not mandatory, and if this were a case of first instance we would be inclined to hold that the procedure outlined is permissive only and not mandatory. This, however, has been construed to be mandatory, the courts of this state

having held that a sale held in any manner other than that set out in the statute was void. A commissioner to hold the sale must be appointed by the court, by an order entered on its minutes (Spencer vs. Levy, 173 S. W. 550, writ of error refused), and the sale must be at public auction. Hardin County vs. Nona Mills Co., 112 S. W. 822; Ferguson vs. Halsell, 47 Texas 421. A sale not made at public auction is void and passes no title. Ferguson vs. Halsell, 47 Texas 421; Llano County vs. Knowles, 29 S. W. 549. The county judge may be appointed as commissioner to hold the sale. Spencer vs. Levy, 173 S. W. 550; Falls County vs. Bozeman, 249, S. W. 890 (a case involving sale of the poor farm).

(5) The statute provides that the sale shall be at "public auction." Though the statute is silent on the question of notice or advertisement, we hold, in accordance with a previous opinion of this department, that a sale must be duly advertised in order to comply with the requirement of "public auction." The former opinion was rendered October 19th, 1915, and appears at page 754, Reports 1914-1916. We quote the following well considered paragraph taken from said opinion:

"It therefore appears it would be necessary, in making the sale of the land belonging to the county, that the commissioners' court appoint a commissioner, and that such sale be at public auction. Although the statute authorizing the sale of real estate belonging to the county and prescribing the procedure to be followed, does not specifically require that such auction and sale be advertised, yet we are of the opinion that such sale partakes so much of the nature of a judicial one as to require the advertisement made essential by law to the validity of sales of the latter character.

"In the case of voluntary auction sales of private property, there is no legal necessity for advertisement, and it is optional with the owner whether an advertisement precede the sale. (2 Ruling Gas Laws, 1122). However, the sale of real estate belonging to a county while a voluntary one on the part of the court, is not a sale of private property. The fact that the Legislature in conferring this power upon the commissioners' court, declared that such sales should be at public auction, discloses the purpose of that body to secure all possible publicity of the sale and to prevent any manipulation of price or favoritism as to purchaser, such as would be possible in a private sale, or at a sale at auction, the time and place of which the public had no notice."

This department recommends that the commissioner appointed give notice of the sale by advertisement in the same mode as prescribed for judicial sales by Article 3808, 1925 Revised Civil Statutes of Texas.

(6) The appointment of a commissioner to hold the sale does not mean that all the powers of the commissioners' court with reference to sales of real estate are thereby delegated to the special commissioner. The court still retains general control, including the power to confirm or reject any sale made by the commissioner at auction. Its action should be evidenced by an order entered in the minutes of the court. The action of the court in this respect is analogous to the control which a probate court retains over administrator's sales. There is a discretion regarding sale of county lands vested in the commissioners' court by the Constitution and Laws of the State, no part of which can be delegated. Logan vs. Stephens County, 98

Texas 283. For this reason the purchasers should be put on notice, by a statement to that effect in the notice of sale, that all bids are subject to approval by the commissioners' court.

In our opinion an oil and gas lease to the county farm of Collin County, fairly made and in conformity with the recommendations herein contained, would vest title to the oil and gas in place in the lessee.

Yours very truly,
R. W. YARBOROUGH,
Assistant Attorney General.

Op. No. 2904.

PUBLIC LANDS—OIL AND GAS—FORFEITURE AND REPURCHASE ACTS OF
1925 AND 1926—EXTENT OF MINERAL RESERVATION IN
LANDS SOLD THEREUNDER.

1. The Forfeiture and Repurchase Acts of 1925 and 1926 held constitutional. Chapter 94, General Laws, Regular Session, 39th Legislature, 1925, as amended Chapter 25, General Laws, First Called Session, 39th Legislature, 1926.

2. All valid leases outstanding at date of forfeiture and repurchase are unaffected by the forfeiture and repurchase.

3. On forfeiture and repurchase under the Act of 1925, and its 1926 amendment, the State retains an undivided onesixteenth of the oil and gas and all of all other minerals, on lands originally sold with a mineral reservation.

4. The forfeited and repurchased land owner is authorized to execute oil and gas leases on behalf of the State on lands forfeited and repurchased under the Acts of 1925 and 1926, the State's share of the income in such cases being an undivided one-sixteenth of the oil and gas produced, as a free royalty.

5. Under such leases the State is entitled to one-half of all bonus and rental payments, the rental to be not less than 10% per acre per annum.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, December 2, 1932.

Honorable Moore Lynn, State Auditor and Efficiency Expert, Capitol Building, Austin, Texas.

DEAR SIR: After receipt of your request of April 19, 1932 for an opinion defining the rights of the State in the minerals in certain lands sold under the Forfeiture and Repurchase Acts of 1925 and 1926, representatives of the Texas Land Owners Association requested that leave be granted them to file briefs on the law questions involved. Pursuant to such leave, a brief was filed with this department on July 22, 1932, by the Hon. E. F. Smith and a separate brief prepared by the Hon. C. L. Black was filed on August 26, 1932, supplemented by an additional list of authorities under date of September 4, 1932.

In view of the importance of the matter and the amount of land involved, your request will be set out in full. It is as follows:

"There is some doubt in my mind with reference to the application of the Act of March 19, 1925, Chapter 94, Page 267, and amended by the Act of October 27, 1926.

"Section 3, of the Act of March 19, 1925, reads as follows:

"Section 3. If the owner at the date of forfeiture shall not exercise his right to repurchase, the Commissioner shall again place the land on the market for sale as is now or may hereafter be provided for the sale of public free school lands. All repurchase under this Act shall be subject to the obligation of interest payments and forfeiture for non-payment of interest that is now provided by law for other purchasers of public free school lands. One-sixteenth of the oil and gas, and all other minerals, in the land included herein, whether known or unknown, are expressly reserved to the public free school fund, in the event the former sale was with mineral reservation."

"This act was amended by Act of October 27, 1926, First Called Session, 39th Legislature, Chapter 25, Page 43, Section 3 of this Act reiterates the fact that one-sixteenth of the oil and gas and all other minerals is reserved to the public free school fund.

"Section 2, of the Act of July 31, 1919, Second Called Session, 36th Legislature, Chapter 81, Page 249 relinquishes fifteen-sixteenths of the value of the oil and gas or other minerals to the owner of the soil in cases where leases are made. If I understand this Act, when a lease is forfeited, all of the minerals revert back to the public free school fund. The same section of this Act provides that the State shall receive not less than 10c per acre per year, plus royalty on all leases made by the owner of the soil in all cases where the minerals were reserved to the public free school fund

"The questions which I would like for you to answer are as follows:

"(1) Does the Act of March 19, 1925, as amended by the Act of October 27, 1926, herein mentioned conflict with Section 2 of the Act of July 31, 1919, in so far as the payments of bonus and rentals are concerned, as has been interpreted by the Supreme Court of Texas in the case of Greene vs. Robison and the Empire-Tippett case? This Act makes no mention of rental.

"(2) Under the Act of March 19, 1925, as amended by the Act of October 27, 1926, is the State entitled to collect either rental or bonus on lands which were forfeited and repurchased under these Acts where the land was originally sold with a mineral reservation?

"(3) Does the Act of March 19, 1925, as amended by the Act of October 27, 1926, actually relinquish or sell to the owner of the soil fifteen-sixteenths of the minerals in fee, reserving only a one-sixteenth free royalty to the public free school fund?

"In practically all cases lessees have been paying the State at least 10c per acre per year as lease rental regardless of whether or not the land was purchased under the Act of March 19, 1925, as amended by the Act of October 27, 1926, or under the Act of July 31, 1919, and the question at issue is, will the State be required to refund the payments made under these latter Acts, and, if not, will it be entitled to collect one-half of the bonus and one-half of the lease rental, as provided in the Act of July 31, 1919?

The questions asked by you all relate to land *originally* sold by the State under a mineral classification and reservation and later forfeited and repurchased by the forfeited land owners under the provisions of the Forfeiture and Repurchase Act of 1925 as amended in 1926. Briefly, these Acts provide that in cases where public free school lands were or might be forfeited for nonpayment of interest which accrued prior to November 1, 1925, the forfeited land owners should have a preference right for a period of 90 days after notice of revaluation in which to repurchase the lands upon new valuations fixed by the Land Commissioner in accordance with the terms of the Acts. These Acts apply to all sold school lands, wherever situated, which come within the class of forfeited lands therein set out. The

emergency clauses of the Acts recite that several years consecutive drought, and the demoralized condition of the cattle business in that portion of the State where most of the public lands are located, have caused a great number of purchasers of said lands to be financially unable to pay the interest due thereon. However, since the passage of these two general acts, the Legislature has from time to time extended their application to particular counties, particular lands, or particular cases. Since lands forfeited and repurchased under those various subsequent acts will also be affected by this opinion, the various subsequent laws of limited application will be briefly mentioned.

Chapter 283, General and Special Laws, 41st Legislature, Regular Session (1929) extends the application of the 1925 and 1926 Acts to those cases where "the forfeiting owner filed his application on January 16, 1928, and which land is located in Kinney County, Texas." Chapter 58, General and Special Laws, 41st Legislature, 1st Called Session (1929) extends the application of the 1925 and 1926 Acts to cases where the applications for repurchase were filed after the expiration of the time fixed by the 1925 and 1926 Acts for so doing, "and which land is located in Gaines, Kinney, and Yoakum Counties, Texas, and also Section 3 in Block Sixty-seven (67) and one-half ($\frac{1}{2}$) in Hudspeth County, Texas," Chapter 92, General Laws, 41st Legislature, 2nd Called Session, (1929) amended the before mentioned act of the 1st Called Session of the same Legislature, making it apply to Hudspeth and San Augustine Counties as well as to Gaines, Yoakum, Kinney and Sec. 3, Blk. 67- $\frac{1}{2}$ in Hudspeth County. Chapter 6, General Laws, 4th Called Session, 41st Legislature (1930) contains a similar extension as respects lands situated in El Paso County, while Chapter 80, laws of same session does likewise with reference to public school lands situated in Jeff Davis County. Chapters 29 and 117, Special Laws, 42nd Legislature, Regular Session (1931) similarly extend the time in Culberson, Brewster, and Loving Counties, while Chapter 91 of the Special Laws of the same session contains a similar extension, but applies only to "which land is located in Dallam County, Texas, and is described as Sections 63 and 64, Block CS, Public School in Dallam County, Texas.

The emergency clauses of these subsequent acts of limited application fail to state the necessity for their passage, but this does not affect their validity.

While your letter does not expressly inquire into the constitutionality of the Acts, it does present questions that can be answered only by passing upon their constitutionality. If the Acts be not valid, the mineral rights of the State would be unaffected and the State's share of the minerals would be as defined in the Relinquishment Act of 1919 (Chapter 81, General Laws, Second Called Session, 36th Legislature 1919) as interpreted in *Greene vs. Robison*, 117 Tex. 516, 8 S. W. (2d) 655, and *Empire Gas & Fuel Co. vs. State*, 47 S. W. (2d) 265.

Article 7, Section 4 of the Constitution of Texas, provides in part as follows:

"The land herein set apart to the public free school fund shall be sold

under such regulations, at such times and on such terms as may be prescribed by law; and the Legislature shall not have power to grant *any relief* to purchasers thereof." (Italics ours).

The Supreme Court of this State has passed upon the constitutionality of an act somewhat similar to that here involved, and in the case of *Judkins vs. Robison*, 109 Tex. 6, 160 S. W. 955, held the Forfeiture and Repurchase Act of 1913 constitutional. The court in another case held that the Act of 1913 was constitutional as applied to cases where, on forfeiture, lands formerly classified as mineral were classified as non-mineral and were resold on the revaluation to the forfeited owner without mineral reservation. *Johnson vs. Robison*, 111 Tex. 438; *Johnson vs. Sunshine Oil Corporation*, 111 Tex. 578. The theory of the courts in construing the forfeiture and repurchase acts is stated so aptly in the brief filed by Judge Black that we take the liberty of quoting therefrom as follows:

"When a sale of school land is forfeited in the prescribed manner for nonpayment of interest, 'the land and all payments' are forfeited to the State and the title thereto reinvests in the State. *Article 5326, R. C. S. 1925*. The right of the State to declare the forfeiture for nonpayment of interest is comparable to the right of rescission in a private owner. *Blum vs. Fristoe, 92 Texas 76, 84*. And the State, having rescinded the prior sale, may then determine, in the same way as any other owner, how and upon what terms it will deal again with the forfeited purchaser. In the exercise of that right it has prescribed two methods by which the contractual relationship between the State and the forfeited purchaser may be renewed: (a) *Reinstatement* of the former sale; and (b) *repurchase* of the land upon new terms. These two are distinct and inconsistent rights granted to the land owner. They are cumulative but inconsistent. *Judkins vs. Robison, Commissioners, 109 Texas 6, 8*.

"Reinstatement constitutes an affirmation of the prior sale; it completely and exactly offset the forfeiture and leaves the former sale in full force. It is, in effect, a waiver of the rescission. Repurchase involves a disaffirmance of the former sale and the making of a new contract with the State upon different terms. If any of the terms of the original contract become terms of the new contract, that is only because the Repurchase Act so prescribes.

"Where the right of reinstatement is claimed, the former contract and the statutes applicable thereto determine the land owner's rights. Where the right of repurchase is claimed, the land owner is making a new contract with the State. . . ."

"It is plain, therefore, that the repurchase contract is a new contract between the land owner and the State, the terms of which are determined by the Repurchase Act, either by the original statement therein or by reference to and adoption of the provisions of other statutes. . . ."

"No valid Constitutional objection can be urged to the Repurchase Act based upon the fact that the contract, authorized by it, changes the contractual relationship previously existing between the State and the land owner. The former sale has been rescinded; that is the essential basis for the operation of the Repurchase Act. The Repurchase Act is itself a sales act. *Judkins vs. Robison, 109 Texas 6*. And the legislature has undoubted power to prescribe the terms of the sale and in that connection to prescribe whether the oil and gas reservation shall be complete, as under former acts, or only one-sixteenth, as prescribed in the Repurchase Act."

The constitutional test of the validity of acts of the character here considered is stated by former Chief Justice Phillips in the following language:

"The test to be applied to it, therefore, is whether its necessary operation is to enable the previous owner to reacquire the land at a less price than he was obligated to pay under his former purchase. If its terms were to that effect or such *were its necessary operation*, we think it should be held invalid though it *purported to deal* with the previous owner as a stranger to the title, as such an Act would but prove an easy method to circumvent the constitutional provision." (Italics ours) *Judkins vs. Robison*, 109 Tex. 6, at page 9.

Hon. J. H. Walker, Commissioner of the General Land Office, informs us that 6,905,000 acres of land were forfeited and repurchased under the Acts of 1925 and 1926, and that of this acreage 3,901,000 acres were originally sold with a mineral classification and a reservation to the State of all the minerals. The Forfeiture and Repurchase Acts of 1925 and 1926 differ in many respects from the Act of 1913, one chief difference being the mode of dealing with minerals. In view of the large amounts involved, and the importance of the matter both to the permanent public school fund and to the individual land owners, we have given this matter our most careful consideration. While the matter is not free from doubt, we are unable at present to say that the *necessary operation* of the Acts of 1925 and 1926 is such as to enable the previous owners to reacquire the land at a less price than they were obligated to pay under their former purchases. In case of such doubt we believe it incumbent upon us to follow the rule announced by Chief Justice C. M. Cureton during his administration as Attorney General. In passing upon the validity of the 48,000 acre grant to Bayland Orphans' Home, Chief Justice Cureton said:

"If we say that we are in doubt as to the constitutionality of the grant to Bayland Orphans' Home, and of the legislative act directing the issuance of patents as evidence thereof, then it seems that we are bound to resolve that doubt in favor of the constitutionality of the legislative acts.

"Judge Cooley, in his work on constitutional limitations, says: 'But when all the legitimate lights for ascertaining the meaning of the constitution have been made use of, it may still happen that the construction remains a matter of doubt. In such a case it seems clear that every one called upon to act where, in his opinion, the proposed action would be of doubtful constitutionality, is bound upon the doubt alone to abstain from acting' (Cooley's Constitutional Limitations, 7th Edition, page 109)". Report of Attorney General 1920-22, page 385.

And again at page 286 of the same report:

"It is quite elementary that in dealing with the Constitution that it should receive a uniform construction.

"Judge Cooley, in his work on Constitutional Limitations, lays down the rule as follows:

"A cardinal rule in dealing with written instruments is that they are to receive an unvarying interpretation, and that their practical construction is to be uniform. A constitution is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable. A principal share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion. It is with special reference to the varying moods of public opinion, and with a view to putting the fundamentals of government beyond their control, that these instruments are framed.' (Cooley's Constitutional Limitations, Seventh Edition, page 88)". Report of Attorney General, 1920-22, page 386.

Bearing in mind the construction placed by the Courts upon the Repurchase Act of 1913, and the rules of law set out above, we are of

the opinion that all doubts should be resolved in favor of the validity of the Forfeiture and Repurchase Acts of 1925 and 1926. So resolving, the Acts are not declared to be invalid on constitutional grounds.

It is somewhat paradoxical that the Constitution prohibits "relief" to purchasers of school land, and that, though Forfeiture and Repurchase Acts are held not to be within the constitutional inhibition, the appellate courts have five times referred to the Forfeiture and Repurchase Act of 1925 as the "Relief Act of 1925." *Huggins vs. Robison*, 10 S. W. (2d) 710 (Comm. Apps.); *Lovett vs. Simmons*, 29 S. W. (2d) 1021 (Comm. Apps.); *Lovett vs. Simmons*, 19 S. W. (2d) 116 (Civ. Apps.); *Campbell vs. Schrock*, 10 S. W. (2d) 165, (Civ. Apps.); and *Gerlach Mercantile Co. vs. State*, 10 S. W. (2d) 1035 (Civ. Apps. W. E. R.). Having overcome constitutional objections, we will adopt the nomenclature of the courts and hereafter in this opinion the Forfeiture and Repurchase Acts of 1925 and 1926 will be referred to jointly as the "Relief Act."

In passing upon the specific questions asked by you it is necessary to distinguish between leases executed before the forfeiture and leases executed afterward, Section 4 of the Act of 1925 reads as follows:

"Whenever any land affected by this Act is repurchased under the rights of repurchase given herein, any lien, legal or equitable, and any valid contractual right in favor of any person or persons existing against, in and to said land or any part thereof at the time of forfeiture shall remain unimpaired and in full force and effect as if no such forfeiture had occurred."

Section 4 of the Act of 1926 reads in part as follows:

"Whenever any land affected by this Act is repurchased under the rights of repurchase given herein, any lien, legal or equitable, in behalf of any person or the State, and any valid contractual right in favor of any person or persons existing in and to said land, or any part thereof, at the time of forfeiture, shall remain unimpaired and in full force and effect as if no such forfeiture had occurred. . . ."

You will note that the Act of 1926 expressly provides that any lien in behalf of any person or the State existing at the time of forfeiture, will remain unimpaired, while the Act of 1925 does not expressly mention the State. The El Paso Court of Civil Appeals has held that Section 4 of the Act of 1925 fixed the status of liens and contractual rights affecting the land before the date of forfeiture, irrespective of the sovereign or private nature of the holder. *Gerlach Mercantile Co. vs. State*, 10 S. W. (2d) 1035 (W. E. R.). In that case it was held that the State's lien for delinquent taxes which accrued before forfeiture was unaffected by the forfeiture and repurchase. The same court, speaking through Judge Higgins in *Morrissey vs. Amburgey*, 292, S. W. 255 (Writ of error refused), said:

"Section 4 of the act *preserves unimpaired any lien and valid contractual right against any land so repurchased.*" (Italics ours).

This rule was followed in *Campbell vs. Schrock*, 10 S. W. (2d) 165, (El Paso Civ. Apps.)

This rule of construction of Section 4 of both the Act of 1925 and the Amendatory Act of 1926 has become well settled. In our opinion

it is sound and correctly interprets the will and intention of the Legislature. All liens and vested contractual rights were preserved in both Acts.

On this point we again take the liberty of quoting from Judge Black's brief as follows:

"If, therefore, the land owner, before forfeiture of his purchase had executed an oil and gas lease under the Relinquishment Act as agent of the State, the rights of the State, the lessee and the land owner under such lease are kept in force notwithstanding the forfeiture and the new contract. Or stated more accurately, the rights thus vested before forfeiture constitute a burden upon the rights acquired under the new contract. The previously existing rights do not prevent the vesting of the rights created by the repurchase contract; they merely burden the rights created by that contract.

"The Repurchase Act keeps in full force and effect the rights previously created under the Relinquishment Act. But the Repurchase Act makes these prior rights a burden on the right created under the Repurchase Act only so long as the prior right exists. If the land owner has previously executed an oil and gas lease under the Relinquishment Act, then the rights thereby created in favor of the lessee, the State and the land owner remain a burden on the title vested under the Repurchase Act until the lease has been terminated and no longer. The Repurchase Act does not give the previously existing rights any new or different status. Referring to Section 4, above quoted, it will be noted that all rights of a contractual nature are dealt with in the same way. They remain 'unimpaired and in full force and effect as if no such forfeiture had occurred'. They are not given any new life or different character."

In our opinion this quotation correctly interprets the legislative intent. In all cases where oil and gas leases were executed before the date of forfeiture by the land owner as agent of the State under the Relinquishment Act of 1919, such contracts, together with any extensions or renewals provided for in such contracts, are unaffected by the forfeiture, reappraisal and repurchase, and the State would be entitled to receive thereunder one-half the royalty (in no event less than one-sixteenth of the gross value of the total production), one-half the lease rental (not less than 10c per acre per annum) and one-half of the bonus (no limit as to amount). *Greene vs. Robison*, 117 Tex. 516, 8 S. W. (2d) 655; *Empire Gas & Fuel Company vs. State*, 47 S. W. (2d) 265.

The preservatory provisions of Section 4 of the Acts operate, on leases executed under the Relinquishment Act, in favor of the forfeited land owner as well as the State. The right of the forfeited owner to receive the other one-half of the income under leases executed under the Relinquishment Act and existing at the date of forfeiture, reappraisal, and repurchase, is secured by Section 4, and his interest in the minerals on repurchase is not changed, by virtue of the forfeiture, into a mere possibility of reverter without interest in present lease income as may have been the case had Section 4 not appeared in the Act. The doctrine of *Caruthers vs. Leonard*, 254 S. W. 779 (Comm. Apps.) does not apply to such leases.

The rights of the State under leases executed under the Lease Act of 1917, or its 1919 amendment, are likewise unimpaired by the forfeiture, and the State is entitled to the same income under such leases that it would have been entitled to had no forfeiture and resale occurred.

Having disposed of those leases which were outstanding at the date of forfeiture, we come now to the more difficult question of the respective rights of the State and the repurchasing owner in cases where no leases were outstanding at the date of forfeiture and where leases are executed under the new relationship created by forfeiture and repurchase. Section 3 of the 1925 Act contains the following provision :

“One-sixteenth of the oil and gas, and all other minerals, in the lands included herein, whether known or unknown, are expressly reserved to the public free school fund, in the event the former sale was with mineral reservation.”

Section 3 of the amendatory Act reads in part as follows :

“One-sixteenth of the oil and gas, and all of other minerals in the lands included herein, whether known or unknown, are expressly reserved to the public free school fund in the event the forfeited sale was with mineral reservation.”

It will be noted that the word “of” preceding “other minerals” in the amendatory Act was not included in the original Act. However, as we view the matter, the reservation is the same in each instance, the amendatory Act merely clarifying but not changing the meaning of the mineral reservation clause of the original Act.

The Relinquishment Act of 1919 (Chap. 81, General Laws, 2nd Called Session, 36th Leg.) recited that its object was to promote the active cooperation of the owner of the soil, *and to facilitate the development of its* (the State's) *oil and gas resources*. The Relinquishment Act then constituted the owner of the soil the agent of the State for the purpose of executing oil and gas leases. Sections 1 and 2, Act, *supra*; *Green vs. Robison*, 117 Tex. 516; 8 S. W. (2d) 655. The Act then attempted to relinquish to the owner of the soil fifteen-sixteenths of all oil and gas in consideration for the surface owners services and as compensation for the damage to his surface estate, but for the stated object of securing his cooperation. While the attempted relinquishment was invalid, the agency created was valid, the manner of selling the State's minerals was constitutional, and the leases executed thereunder were valid. *Greene vs. Robison*, *supra*. Though the attempted oil and gas relinquishment was invalid, the surface owner and his lessee did obtain an interest in the minerals on the execution of a valid lease, the surface owner's mineral interest then becoming an assignable “property right.” *Lamar vs. Garner*, 50 S. W. (2d) 769 (Comm. Apps.) In passing the Relief Act the Legislature necessarily had in mind the then existing statutes, the agency relationship existing thereunder, and the mode of development being followed in regard to sold school lands with a mineral reservation. The original Act of 1925 recited in the emergency clause that one of the objects of the passage of the Act was to prevent a great loss to the school fund. Chief Justice Pelphrey of the El Paso Court of Civil Appeals, in the *Gerlach Mercantile Company vs. State*, 10 S. W. (2d) 1035 (Writ of error refused), stated that the Relief Act was passed for the twofold purpose of relief to the purchaser and the protection of the public school fund. Such were the objects

to be attained by the Legislature, which had the terms of the Relinquishment Act before it.

To effectuate those objects the Legislature used certain expressions to identify the mineral estate reserved to the State. It is our task to interpret the Acts in such manner as to reflect the Legislative intent, and to construe them in such a manner as to avoid conflict with the Constitution. We believe that the reasonable interpretation of these Relief Acts is one which gives effect to the plain wording of the mineral reservation clause. So interpreting, we construe both the Acts of 1925 and 1926 to vest in the forfeited and repurchasing owner fee title to fifteen-sixteenths of the oil and gas and none of the other minerals, in cases where the land was originally sold with a mineral reservation. In such cases we hold the interest of the State to be a reserved one-sixteenth of the oil and gas in fee, and fee title to *all of all other minerals*. Bearing in mind the terms of the Relinquishment Act and the terms of both Relief Acts and the objects to be attained by all three acts, we believe that this interpretation of the rights and title of the State and the repurchasing owners in the oil and gas and other minerals more nearly represents the intent of the Legislature than any other construction. In dealing with minerals other than oil and gas under the Relief Act, attention is called to the fact that the Relinquishment Act applies only to oil and gas.

This construction is concurred in by counsel for the Land Owners Association; but the contention is made that there is no authority in the land owner, after a forfeiture and repurchase, to execute an oil and gas lease on behalf of the State, that no payments of any kind are due to the State under such a lease (it being no authorized contract of the State), that a taking of oil thereunder is a trespass (as regards the State's one-sixteenth interest) and the State's only remedy is recovery of one-sixteenth of the value of the oil produced, less the cost of production.

With that contention we cannot agree. We have heretofore pointed out some of the considerations moving the Legislature to passage of the Relief Act, and some of the facts necessarily considered by that body. The acts recited that one object of the Legislature was the preservation of the public school fund. Bearing these things in mind, and considering the mineral estates created under the Relief Act and the paucity of provisions therein dealing with these mineral rights, we are of the opinion that those portions of the Relinquishment Act authorizing the surface owner to execute leases on behalf of the State are to be read into and construed as a part of the Relief Act. The Legislature reserved one-sixteenth of the oil and gas in the Relief Act, the same share of production that it obtains in the usual lease under the Relinquishment Act. Looking at the legal history of these mineral reservation school lands and the course of dealing therewith, we are of the opinion that the Legislature intended that the surface owner have the same authority to execute oil and gas leases on mineral reservation school lands forfeited and repurchased under the Relief Act that he had on lands originally governed by the Relinquishment Act. All oil and gas leases executed by the forfeited and repurchasing owner under the Relief Act are presumed to be for the benefit

of the State also. After the passage of the Relief Act and forfeiture and repurchase thereunder certain provisions of the Relinquishment Act, as construed by the Courts, are clearly no longer applicable. As consideration for his services in executing the lease, the land owner and his lessee no longer obtain fifteen-sixteenths of the State's share of the minerals; fee title to "an undivided fifteen-sixteenths of all oil and gas and the value of the same" (the words of the Relinquishment Act) has already passed under the Relief Act and that provision of the Relinquishment Act is no longer applicable. Even if held to be applicable, it would result in the creation of no greater oil and gas estate in the forfeited and repurchasing owner and his lessee than he obtained on forfeiture and repurchase, for the Relinquishment Act provided for the relinquishment of an undivided fifteen-sixteenths of "all oil and gas * * * that may be within and upon the surveyed free school and asylum lands," and the reservation to the State of the remaining undivided one-sixteenth of "all oil and gas and the value of the same." The Relinquishment Act does not purport to relinquish fifteen-sixteenths of what the State has, it deals with fifteen-sixteenths of the *whole*, and once that fifteen-sixteenths passes (under the Relief Act) no greater estate in the repurchasing owner or his lessee can be created by reference to the Relinquishment Act.

This does not appear to us to be a strained construction of the law, and neither is there any statutory impediment to this construction. The Legislature, on passing the Relinquishment Act, thought that the land owner had acquired fifteen-sixteenths of the oil and gas, and created an agency in the owner of what they thought to be fifteen-sixteenths of the oil and gas in place. Under our construction of the Relief Act, the Legislature has actually accomplished under the Relief Act with reference to lands sold thereunder what it sought to accomplish under the Relinquishment Act. There is no warping of the legislative intent, and no legislative inconsistency, in creating a fee title in fifteen-sixteenths of the oil and gas and an agency in the owner thereof for the purpose of protecting the State's interest. The Legislature sought to do this under the Relinquishment Act, its failure to accomplish this result being due to a constitutional inability to vest a fee title of fifteen-sixteenths of the oil and gas, but there is no constitutional objection to the creation of the agency (*Greene vs. Robison, supra*), and this is true regardless of whether title to fifteen-sixteenths of the oil and gas is vested (under the Relief Act), or whether the right of fifteen-sixteenth of the oil and gas becomes an assignable property right only on the execution of an oil and gas lease (Relinquishment Act).

The estate of the forfeited and repurchasing owner is not increased by the execution of his lease, but there is still ample consideration for his services in acting as agent for his cotenant, the State, in executing the lease. Since one cotenant is not privileged to drill for and produce oil and gas from the common land without the consent of the other without being liable in damages, or subject to being stopped by injunction, the State in authorizing the execution of the lease by the repurchasing owner of the undivided fifteen-sixteenths of the oil and gas is conferring a benefit on such owner, for the un-

divided power to execute a lease on behalf of all the owners places the surface owner in an advantageous position as respects his undivided oil and gas estate, and makes it possible for him to dispose of his interest at a fair market price, unimpaired by the otherwise damaging factor of a non-consenting cotenant. For authorities on lack of cotenants power to bind the non-consenting cotenant by lease see Summers, Oil & Gas, Sec. 63, page 220 and Thuss, Texas Oil & Gas, Sec. 34, page 50, and the cases there cited.

Neither the Relief Act nor any subsequent law has set up any new machinery for the lease of the State's oil and gas interest in lands forfeited and repurchased under the Relief Act. In our opinion this evidences an intent on the part of the Legislature to carry forward in the Relief Act the then existing method of leasing for oil and gas under the Relinquishment Act. Since the Relinquishment Act and the Relief Act were passed for the purpose of protecting the school fund, securing the cooperation of the land owners, and in order to bring order out of chaos in the leasing of public school lands for oil and gas (*Greene vs. Robison*) the contention that the Legislature did not intend the Relinquishment Act to apply to lands forfeited and repurchased under the Relief Act insofar as authority in the land owner to execute oil and gas leases on behalf of the State is concerned, is we believe, without merit. It staggers credulity to impute to the Legislature an intent to leave confusion worse confounded, the State's one-sixteenth undivided oil and gas interest unprotected with no leasing authority in anyone to execute leases on its behalf, with the forfeited and repurchasing surface owner claiming the right to lease his undivided fifteen-sixteenths oil and gas estate, and his lessee claiming the right to produce to the limit allowed by law. We are of the opinion that the Legislature intended the leasing procedure initiated by the Relinquishment Act to apply to lands forfeited and repurchased under the Relief Act. There was a legislative intent, implied by law when read in the light of the history of the mineral reserve school lands, not only to permit but to require the repurchasing owner to lease for oil and gas as he had done before forfeiture and repurchase.

We are of the opinion that, where not in express conflict with the Relief Act, the Relinquishment Act applies to sales made under the Relief Act. Where express conflict exists, the terms of the Relief Act, being later in point of time, would prevail. The forfeited and repurchasing owner is authorized to execute leases on behalf of the State; all leases executed by him are presumed to be on behalf of the State also, and all terms of the statutes relating to place and manner of payment of sums due the State and liens on lands and oil produced to secure same, under the Relinquishment Act, are applicable also to payments due to the State under the Relief Act.

On production, the State's royalty is one-sixteenth of the gross value of the oil and gas produced, unburdened with any part of the cost of production. It was the intention of the Legislature, in the Relief Act, to reserve to the State one-sixteenth of the gross value of the oil and gas produced, as a free royalty—to keep for the State the same *royalty* interest the State had under the usual oil and gas lease

executed under the Relinquishment Act. The holding that the State is entitled to this share as a free royalty is in no wise inconsistent with the legal effect of the reservation, which is of a one-sixteenth fee interest. The intention of the parties governs in this case, the same rule of construction applying here that governs the making of contracts between individuals. *Greene vs. Robison*, 8 S. W. (2d) 655, at 662. There is ample authority, as regards leases between individuals, for the statement that a reservation of one-sixteenth of the oil and gas in fee often entitles the grantor to a free royalty interest of one-sixteenth of the value of the gross production at the well. *Summers, Transfers of oil and Gas Rents and Royalties*, 10 *Tex. Law Review* 5, and cases there cited from many states; *Hogg vs. Magnolia Petroleum Company* 267 S. W. 482 (Comm. Apps.); *Krutzfield vs. Stevenson*, 86 *Mont.* 463, 284 *Pac.* 553; *Lockhart vs. United Fuel Gas Company*, 105 *W. Va.* 69, 141 *S. E.* 521. In the case of *Ferguson vs. Steen*, 293 S. W. 318, the Waco Court of Civil Appeals treated the one-eighth royalty reserved in an '88 producer's special Texas form' lease, said clause being in the following words:

"To deliver to the credit of lessor, free of cost, in the pipe line to which he may connect his wells, the equal one-eighth part of all oil produced and saved from the leased premises."

As equivalent to a reservation of one-eighth of the minerals in fee. After execution of the lease the grantor sold a one-half interest in the one-eighth royalty reserved. In dealing with the grantor's interest after such lease and sale, the Court said:

"They (grantors) * * * owned a *one-sixteenth or royalty interest* in the minerals in or under said land * * *. This royalty interest was certainly not the property of the lessee, but was the property of appellants (grantors), and was a mineral right or privilege 'belonging' or 'appertaining' to said 120 acres of land. * * * The effect of the lease was to sever said minerals * * * leaving in appellants (grantors) * * * *one-eighth or royalty interest* in said minerals, to be delivered when mined and brought to the surface. (Citing cases). * * * Appellants had two estates in fee simple, *one being one-eighth of the minerals in place*. * * * Appellants sold and conveyed one-half of their one-eighth interest in said mineral or royalty interest, which left them one-sixteenth mineral or royalty interest." 293 S. W. at 320.

While the courts differ on these terms as to "royalty" and "fee interest," the *Ferguson vs. Steen* case has ample support in the other Texas cases, many of which are cited in that opinion. *Hager vs. Stakes*, 116 *Texas* 453; 294 S. W. 835. In both *Ferguson vs. Steen* and *Hager vs. Stakes* the courts gave effect to the intention of the parties, and held reservations of fractional parts of the oil on production as free royalty to be reservations of interests in the title to the oil in place to the fractional extent stated. If a royalty interest of one-eighth of all oil produced may be construed as a reservation of fee title to one-eighth of the oil in place, in order to give effect to the intention of the parties, no sound reason is perceived why, to effectuate the same intent, fee title to one-eighth (or one-sixteenth) of the oil and gas in place may not be construed to be a reservation of a one-eighth (or one-sixteenth) royalty interest in all oil produced.

Our opinion that the effect of the Relief Act is to leave in the

State an undivided one-sixteenth oil and gas estate, which, on production, belongs to the State free of any cost of production is concurred in by the Hon. E. F. Smith, in his brief filed on this matter, in the following language:

"As a practical proposition, the State is entitled to receive from the lessee, under an oil and gas lease contract executed under facts such as here suggested, one-sixteenth of all oil produced, or the value thereof in money. * * * The repurchaser of the land, after the oil and gas lease has terminated and ceased to exist, under the facts such as are here suggested may proceed to make and execute an oil and gas lease upon the land upon any terms and conditions which may be agreeable to him and to his lessee, provided that in all events, the State shall thereafter receive one-sixteenth of all oil and gas produced or the value thereof in money."

What has been said disposes of all questions concerning the amount of royalty due the State on production of oil and gas under leases executed by the forfeited and repurchasing land owner subsequent to the forfeiture. The reasons for the conclusions reached and the authorities cited in support thereof are largely determinative of the remaining questions concerning bonus and rental. Since the State owns fee title to one-sixteenth of the oil and gas in place under lands forfeited and repurchased under the Relief Act, once it be determined that the repurchasing owner have authority to execute a lease on behalf of the State, there is no longer any sound basis for contending that the State obtains no share of the bonus and rentals under such lease. The sole question then becomes one of amount. If the doctrine of *Way vs. Venus*, 35 S. W. (2d) 467 (Civ. Apps.) be strictly applied, the State would be entitled to only one-sixteenth of the bonus and rentals. If the intention of the Legislature be sought, if, by analogy, the relinquishment act be applied and the cases of *Greene vs Robison*, supra, and *Empire Gas & Fuel Co. vs. State*, 47 S. W. (2d) 265, be followed on that analogy, the State's share of the bonus and rentals will be one-half. The terms of the Relief Act have been briefly summarized in this opinion. The history of other mineral leasing and sales acts and the conditions that called forth the Relinquishment Act have been set forth in *Greene vs. Robison*, supra. From the ruling made with respect to the royalty interest due the State, it logically follows that if a reservation of one-sixteenth of the oil and gas in fee entitles such owner to a free royalty of one-sixteenth of the oil on production, to one-half of the usual total royalty, then it entitles the owner of such reservation to one-half of the bonus and rentals also. While the Relief Act is ambiguous on this point, the Legislature was dealing principally with relief from drought and such ambiguity would not result in the utter taking away of a valuable property right of the State. The fact that the Legislature attempted to follow the Relinquishment Act in a reverse manner, by reserving in the Relief Act one-sixteenths of the oil and gas, instead of relinquishing fifteen-sixteenths of the oil and gas, does not mean that the estate reserved in the one instance was less than that which would have been reserved had the attempted relinquishment been valid in the other. On passage of the Relief Act, that portion dealing with the mineral reservation was very short, but patently based upon the Relinquishment Act. Under the Relinquish-

ment Act the State is entitled to receive one-half of the bonus and rentals. The mineral estate attempted to be relinquished in the Relinquishment Act was actually relinquished in the Relief Act, but that alone does not necessarily change the amount of the bonus and rental to which the State is entitled. Since leases executed on lands forfeited and repurchased under the Relief Act are necessarily executed in accordance with the terms of the Relinquishment Act, the terms of the latter act with reference to the share of bonus and rentals due the State will control.

Where an Act is fairly susceptible of two constructions, one of which will uphold the validity of the act while the other will render it unconstitutional, the one which will sustain the constitutionality of the law must be adopted. *Empire Gas & Fuel Company vs. State*, 47 S. W. (2d) 265 at 272. The test of the constitutionality of Forfeiture and Repurchase Acts has been laid down by the Supreme Court in the language of Judge Phillips, quoted above. Under that test, even if the terms of an Act are unexceptional, if its *necessary operation* be to enable an owner to reacquire land at a less price than he was obligated to pay under his former purchase, the Act is void. Before forfeiture and repurchase, the owners were required to share the bonus and rental equally with the State. *Greene vs. Robison*, supra; *Empire Gas & Fuel Company vs. State*, supra. There is no language in the Relief Act to indicate that that relationship had changed, and if the Relief Act be construed as relieving the forfeited and repurchasing owner of the obligation of dividing bonus and rental payments equally with the State, and the Land Commissioner did not take that fact into consideration in revaluing the land, then the *necessary operation* of the law would result in an increase of the forfeited and repurchasing land owner's share of the mineral income while correspondingly decreasing the State's share of the mineral income, thus enabling the land owner to acquire that share of the mineral income which he did not previously have, and that without compensation therefor. If so construed, the Relief Act would be void. It will hardly be contended that the Land Commissioner took into consideration the value of the minerals on revaluing the lands, because both the Land Commissioner and the Legislature thought that the mineral estates were unchanged by forfeiture and repurchase. The case of *Greene vs. Robison*, supra, had not at that time (1925 and 1926) been decided. During the 1924-26 biennium 4,844,626.55 acres of forfeited school land were resold for \$7,011,470.00 and during the 1926-28 biennium 1,404,373 acres of forfeited school land were resold for \$2,191,508.00, making a total of 6,249,000 acres forfeited and resold during the period mentioned, for a total consideration of \$9,202,978.00 or an approximate price of One Dollar and forty-seven (\$1.47) cents per acre. See Reports Land Commissioner, 1924-26, page 7; 1926-28, page 18. Art. 5310, Revised Civil Statutes 1925, forbids the sale of agricultural lands for less than \$1.50 per acre and forbids the sale of grazing lands for less than \$1.00 per acre, the minimum prices fixed in this article relating to sales of land *with full mineral reservation*. Such being the status of the law, the very prices for which the land was resold to the forfeited and re-

purchasing owners refutes the contention (if any be made) that the value of the minerals was considered in fixing the price on repurchase. Giving to the Relief Act that construction which sustains its validity, we construe it to reserve to the State one-half of the bonus and rentals payable under oil and gas leases on lands leased under the Relief Act.

There is another rule of construction, the application of which calls for the conclusion heretofore expressed by us. This rule was stated by Judge Sharp in the Empire Gas & Fuel Company case in the following language:

“The rule is also well settled that legislative grants of property, rights, or privileges must be construed strictly in favor of the state on grounds of public policy, and whatever is not unequivocally granted in clear and explicit terms is withheld. Any ambiguity or obscurity in the terms of the statute must operate in favor of the state. 36 Cyc. p. 1177; Lewis’ Sutherland Statutory Construction, Vol. 2, par. 548; Central Transportation Co. vs. Pullman’s Palace Car Co., 139 U. S. 24, 11 S. Ct. 478, 35 L. Ed. 55; 18 R. C. L. p. 1220. This act has been carefully considered in the light of the foregoing rule, and there is found no language expressing the intention of the Legislature to give the landowner all of the bonus. Under this rule, if the act is silent as to whom the bonus belongs, then it necessarily would become the property of the state. However, under the fair and reasonable construction given to the expression, ‘like amounts to the owner of the soil,’ by the court in *Greene vs. Robison*, we are constrained to hold that the owner of the soil may receive one-half of the bonus, and the remaining half is to be received by the State. Certainly there is no express intention or provision in the act that all of the bonus should be paid to the landowner, and it cannot be construed as giving all of the bonus to the landowner. To hold that the landowner is to receive all of the bonus would be to read into the law words not placed there by the Legislature.” *Empire Gas & Fuel Company vs. State*, 47 S. W. (2d) at 272.

While we do not regard the matter of such doubt as to call for its application, yet there is a rule of this department concerning doubtful rights in mineral lands which requires the determination of doubtful questions in favor of the State. This rule has been followed ever since the administration of the Honorable C. M. Cureton as Attorney General, and is most briefly stated in an opinion written by the Hon. E. F. Smith, former Assistant Attorney General, and approved by the Honorable Chief Justice Cureton, then Attorney General. The statement is as follows:

“If the State owns the minerals in this land, such ownership may be of little or great value, but if we advise that this ownership be surrendered on the state of facts presented and our advice should be wrong, our error can never be corrected, whereas if our advice not to surrender the rights of the State is wrong, the vendees of Mr. Gibson can have our error corrected by proper legal proceedings.

“In all controversies involving the rights of the State, it is the duty and likewise the policy of the Attorney General’s Department to decide all substantial doubts in favor of the State for the reasons just mentioned.” Report of Attorney General, 1920-22, page 410, at 413.

The caption of the Act of 1925 contains, among others, the following:

“ . . . Providing for . . . , reservation of minerals; . . . ”

Giving effect to the object expressed in the caption of the Act, we

give it that construction which will result in no diminution of mineral income to the State, as that income was determined by laws existing at the time of the passage of the Relief Act. Any other construction would place the body of the Act in conflict with its caption, and render the Act invalid under the doctrine of *Gulf Production Company vs. Garrett*, 119 Tex. 72. It is of doubtful validity even under our construction, but we resolve all doubts in favor of the constitutionality of the Act.

For the reasons enumerated, we hold that the State is entitled to one-half of all bonus and rentals accruing under leases executed by the forfeited and repurchasing owner under the Relief Act. While we base this opinion upon our construction of the legislative intent, and upon the practical necessity of so construing the Act in order to sustain its constitutionality, we call attention, in passing, to authorities reaching similar conclusions with respect to grants by private persons. *Summers, Transfers of Oil and Gas Rents and Royalties*, 10 Texas Law Review 5.

We have answered all of your questions with respect to royalties, rents and bonus on lands forfeited and repurchased under the Relief Act except that dealing with the payments of 10c an acre. The Relinquishment Act fixes a minimum lease rental to the State of 10c per acre per annum. While no minimum lease rental is expressly mentioned in the Relief Act, leases executed on lands forfeited and repurchased under the Relief Act are executed pursuant to the authority contained in, and subject to the terms prescribed by, the Relinquishment Act of 1919. The right and obligation to lease under the Relinquishment Act carries with it the right and obligation to lease on the terms there set out. Since the lease provisions of the Relinquishment Act govern leases made under the Relief Act it necessarily follows that the minimum lease rental of 10c per acre is due on lands leased under the Relief Act. The statement, contained in your letter of inquiry, that most lessees under the Relief Act have been paying the 10c per acre minimum lease rental shows that such lessees have construed the Relinquishment Act to be applicable to leases made under the Relief Act, thus reaching the same conclusion reached by us in this opinion. No refunds are due the lessees on account of these minimum lease rental payments. The State is entitled to receive them, and one-half of all additional rental and one-half of all bonus payments also.

Article 5262 of the 1925 Revised Civil Statutes requires the Land Commissioner to keep in the Land Office copies of all leases issued under the Relinquishment and Relief Acts. The corresponding obligation rests on all land owners and lessees, under those Acts, to file such lease copies. Attention is also called to Article 5372 of the 1925 Revised Civil Statutes, which provides for forfeiture of leases by the Land Commissioner where a person operating under the Relinquishment Act "should knowingly fail or refuse to give correct information to the proper authority." It is not an unreasonable construction to say that one who knowingly fails to file a copy of a lease as required by law is knowingly failing to give correct information. Article 5372 specifically provides for cancellation of leases by the Land Com-

missioner for failure to pay any sum due thereunder.

While we have answered all questions asked by you, attention is called to the fact that your questions relate to lands to which the Relinquishment Act applied prior to forfeiture and repurchase under the Relief Act. You did not specifically inquire into the status of lands originally sold without mineral reservation, but forfeited and repurchased under the Relief Act. That question was not covered in the briefs submitted, and in view of the amount of land involved and necessarily affected by that question, we expressly decline to pass thereon in this opinion. The holdings herein apply only to lands sold with a mineral reservation before forfeiture and repurchase under the Relief Act.

Yours truly,

R. W. YARBOROUGH,
Assistant Attorney General.

Op. No. 2815.

PUBLIC LAND—STATE PUBLIC FREE SCHOOL LAND—SALE BY
GOVERNOR.

1. Under Article 5245 of the Revised Civil Statutes of Texas of 1925, providing that "When this State may be the owner of any land desired by the United States for any purpose specified in this title, the Governor may sell such land to the United States," the Governor is not authorized to sell state public free school land.

2. Under Article 5245 of the Revised Civil Statutes of Texas of 1925, providing that "When this State may be the owner of any land desired by the United States for any purpose specified in this title," the Governor is authorized to sell to the United States Government for any such purpose any unpatented land in this State included in the lakes and bays along the Gulf of Mexico "within tide water limits."

Construing: Arts. 5242 and 5245, R. C. S., 1925.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, September 23, 1930.

Honorable Dan Moody, Governor of Texas, Austin, Texas.

DEAR GOVERNOR: You have submitted orally to the Attorney General for advice the question of your power and authority to sell the United States Government for its use in the construction and maintenance of the Inter-Coastal Canal certain lands in Galveston County. With this request you have transmitted certain affidavits as to the nature and character of the land in question. Our understanding is that this land has never been granted by the State and that the title to the same is in the State by virtue of its sovereignty and not by acquisition otherwise, and our answer is based upon this assumption.

Your inquiry raises a question that has never been passed upon directly by our Supreme Court nor any of our courts of Civil Appeals nor by any Attorney General of Texas as far as we can find.

Articles 5242 and 5245 of the Revised Civil Statutes of Texas of 1925 read as follows:

"Art. 5242. (5252). The United States Government through its proper agent may purchase, acquire, hold, own, occupy, and possess such lands

within the limits of this State as it deems expedient and may seek to occupy and hold as sites on which to erect and maintain light houses, forts, military stations, magazines, arsenals, dock yards, custom houses, post offices and all other needful public buildings, and for the purpose of erecting and constructing locks and dams, for the straightening of streams by making cutoffs, building levees, or for the erection of any other structures or improvements that may become necessary in developing or improving the waterways, rivers and harbors of Texas and the consent of the Legislature is hereby expressly given to any such purchase or acquisition made in accordance with the provisions of this law.

"Art. 5245. (5273) (372) (331). When this State may be the owner of any land desired by the United States for any purpose specified in this title, the Governor may sell such land to the United States, and upon payment of the purchase money therefor into the Treasury, the Land Commissioner, upon the order of the Governor, shall issue a patent to the United States for such land in like manner as other patents are issued."

These statutes clearly authorize you to sell this land to the United States for the purposes stated in your inquiry unless this is precluded by some provision of our State Constitution or some well established rule of construction excluding this land from the operation of these statutes.

The only provisions of our State Constitution that could have any bearing on this question are sections 2 and 4 of Article 7 of that instrument. They provide that " * * * one-half of the public domain, and all sums of money that may come to the State from the sale of any portion of the same, shall constitute a perpetual public school fund," and that "the lands herein set apart to the public free school fund, shall be sold under regulations, at such times, and on such terms as may be prescribed by law."

In *Hogue vs. Baker*, 92 Tex. 63, 45 S. W. 1004, decided May 23, 1898, it was conceded that the State had theretofore granted otherwise than by sale as state public free school land more than one-half of the public domain as it existed on April 18, 1876, when our Constitution containing these provisions was adopted, and on that basis it was held that by virtue of these provisions the remainder of the public domain stood dedicated or set aside as state public free school lands and could not be disposed of by the State otherwise than by sale "under such regulations, at such time, and on such terms as may be prescribed by law."

Shortly thereafter, by the Act of May 2, 1899, (Ch. 16, p. 14, Gen. Laws, Reg. Ses. 26th Leg.), provision was made for an accounting or adjustment of the public domain as between the State and its permanent school fund. Certain previously located and surveyed lands were also set apart as state public free school lands by Chapter 81, page 128, General Laws, Regular Session, 26th Legislature, the Act of April 18, 1899. Then followed the Act of February 23, 1900 (Ch. 11, p. 29, Gen. Laws, 1st C. S., 26th Leg.), by which a complete and final accounting or adjustment of the public domain was made between the State and its public free school lands. This Act provided that

"* * * there is hereby set apart and granted to said school fund * * * all of the unappropriated public domain remaining in the State of Texas of whatever character, and wheresoever located * * * except that included

in lakes, bays, and islands along the Gulf of Mexico within tide water limits."

Since its enactment this provision has been and is now carried in our Revised Civil Statutes without any substantial change (R. C. S. 1911, Arts. 5278 and 5385; R. C. S. 1925, Arts. 5416), and is now the law of this State.

If this land, therefore, is not some part of or included in a lake, bay, or island along the Gulf of Mexico "within tide water limits" and is "public domain" within the meaning of the foregoing mentioned statute, it is state public free school land. If it is a part of or within a lake, bay, or island along the Gulf of Mexico "within tide water limits," or is not "public domain" within the meaning of that statute, it is not state public free school land.

The lands so set apart as state public free school lands nevertheless remain the property of the State in its sovereign capacity, and may be disposed of by the Legislature subject only to the limitations in doing so placed upon the Legislature by the Constitution. (*Greene vs. Robison*, 109 Tex. 367, 210 S. W. 398; *Greene vs. Robison*, 117 Tex. 516, 8 S. W. (2d) 655, and authorities there cited), and it is plain that such lands may be sold "under such regulations, at such times, and on such terms as may be prescribed by law." Such lands may not be otherwise sold, however, and a statute so providing is prerequisite to a sale. In *Chancey vs. State*, 84 Tex. 529, 19 S. W. 706, it is said that "the public school land can be sold only 'under such regulations, at such times, and on such terms as may be prescribed by law.'" In *Smissen vs. State*, 71 Tex. 223, 9 S. W. 112, it is said that this provision of our Constitution "left it to be determined by the Legislature at what time and on what terms and under what regulations the sales should be made." *Swenson vs. Taylor*, 80 Tex. 584, 16 S. W. 336, *Brown vs. Shiner*, 84 Tex. 505, 19 S. W. 686, *Reed vs. Rogan*, 94 Tex. 177, 59 S. W. 255, *Greene vs. Robison*, 117 Tex. 516, 8 S. W. (2d) 655, and *Theisen vs. Robison*, 117 Tex. 489, 8 S. W. (2d) 646, are to the same effect. Indeed, such is the plain provision of the Constitution itself.

The Legislature has specifically provided by statute for the sale of such lands, as will be seen by reference to Article 5309 et seq., of our Revised Civil Statutes of 1925. Having thus prescribed the regulations, times, and terms for the sale of these lands, and the sale of same being authorized only "under such regulations, at such times, and on such terms as may be prescribed by law," and there being no other statute so providing, it is our view that such lands can only be so sold. It is quite apparent, we think, that said Article 5245 hereinbefore quoted does not prescribe either the regulations, times, or terms for the sale of land by the Governor.

There is also this feature. If this land is state public free school land and there are not on file in the General Land Office valid approved field notes of same, or of the larger area of which this land may be a part, then it is unsurveyed state public free school land within the meaning of Chapter 22, General Laws, Third Called Session, 41st Legislature, appearing at page 526 of the published acts of the Second and Third Called Sessions of that Legislature, and is

withdrawn from sale by that act. If this land, therefore, is state public free school land, it is our opinion that its sale by you as requested is not authorized by said Article 5245.

We do not mean to say that the Legislature has not the power to authorize the sale of such lands by the Governor to the United States Government for such purposes. It has such power. *Greene vs. Robison*, 117 Tex. 516, 8 S. W. (2d) 655. We only mean to say that in our opinion this statute does not do so.

There remains the question of your authority to sell this land to the United States Government under this statute in the event it is included in a lake or bay along the Gulf of Mexico within tide water limits and is for that reason not state public free school land.

That Texas owns and through its Legislature may grant the title to and right to the sole and exclusive use of its lakes, bays, and islands along the Gulf of Mexico within tide water limits, the use of such land, however, being subject to certain powers of the United States Government, was settled as the law of this State at an early date. *City of Galveston vs. Menard*, 23 Tex. 349 (390). This being true, it is elementary that such a grant may be effected by or through such officer or agency as may be designated by statute for that purpose, there being nothing in our Constitution to the contrary. In other words, the power to make the grant carries with it the right and power to provide the agency for effecting the grant. These powers being in the Legislature, it follows that there rests in the Legislature the power to designate the Governor as the officer or agency of the State for effecting such grant. Said Article 5245 is sufficient, therefore, to authorize the sale by the Governor to the United States Government for any purpose designated in said Article 5242 of unpatented lands included in any lake or bay along the Gulf of Mexico "within tide water limits," provided such land comes within the meaning of said Article 5245.

Article 3481 of Title 71 of our Revised Civil Statutes of 1895 declared "all the public school university, asylum, and public lands containing valuable mineral deposits" reserved from sale except as provided in that title, and "free and open to exploration and purchase under regulations prescribed by law." Article 3498a of that title declared that "all public school, university, asylum, and public lands specially included under the operation of this title, * * * containing valuable mineral deposits, are hereby reserved from sale or other disposition, except as herein provided, and are declared free and open to exploration and purchase under regulations prescribed by law." Then followed certain provisions for the sale of such lands by the Commissioner of the General Land Office. The lands to which these statutes are applicable were not described otherwise than as here stated. The case of *De Merit vs. Robison*, 102 Tex. 358, 116 S. W. 796, was a mandamus proceeding to require the Commissioner of the General Land Office to sell to relator under these statutes two tracts of land "within tide water limits and under the ebb and flow of the tides from the high seas through the Gulf of Mexico, Galveston Bay, and San Jacinto Bay," and which "at ordinary tide * * * is covered with water to the depth of eighteen inches, but when the

tide ebbs * * * is uncovered." The statutes had been fully complied with by relator and the sole question was whether or not this land came within the term "public lands" as used in these statutes. The negative was held. The court said:

"Neither the title of the State to the land which was sought to be purchased nor the power of the State to sell the land is involved in this litigation. * * *

"Undoubtedly the use of the language: 'All public school, university, asylum and public lands,' signifies that public lands mean different lands from the school, university or asylum lands, but it does not necessarily follow that it includes all other lands except those enumerated. * * *

"The rule at common law is that a grant of land bordering on the coast where the tide ebbs and flows conveys title only to the line of ordinary high tide, unless there be something to indicate an intention to extend the grant beyond that line. *Mann vs. Tacoma Land Co.*, 44 Fed. Rep. 27; s. c. 153 U. S. 273; *Morris vs. United States*, 174 U. S. 196; *Galveston vs. Menard*, 23 Tex. 349; *Rosborough vs. Picton*, 12 Tex. Civ. App., 113. * * *

"There is nothing in articles 3498a and 3498j which indicates that the Legislature used the words, 'public lands,' in a sense other than that which the law attaches to them. It follows that the relator had no right to purchase, nor had the Commissioner power to sell, the soil lying below the line of ordinary high tide. In contemplation of law it was not land, but water."

In the course of its opinion the court cites and discusses a number of cases to the effect that a grant by the State of land upon the coast carries only "to the line of ordinary high tide unless there be something to indicate an intention to extend the grant beyond that line," the rule thus stated resting back upon and being the proper construction of the statute authorizing or providing for the sale or grant of the land by the State. The case of *Roberts vs. Terrell* is also cited. In that case the holder of a land certificate under a statute authorizing it to be located "upon any of the vacant public lands of the State either within or without the several reservations heretofore created by law" was denied the right to take thereunder certain land constituting a part of Mustang Island, the theory being that such islands, although "public land" in a sense, are not regarded as coming within the purview of a statute providing for the sale or grant of public land, in the absence of some language more definitely indicating a legislative intent to include them.

The case of *Landry vs. Robison*, 110 Tex. 295, 219 S. W. 819, involved the question whether or not a part of the bed of a navigable stream was subject to the provisions of Chapter 173, page 409, General Laws, Regular Session, 35th Legislature, approved April 9, 1913, providing for the issuance of oil and gas permits on "all public school, university, asylum, and the other public lands, fresh water lakes, islands, bays, marshes, reefs, and salt water lakes belonging to the State of Texas." The court cites and considers *DeMerit vs. Robison*, and *Roberts vs. Terrell*, *supra*, and other authorities, and says:

"It is the contention of respondents that the bed or channel of a navigable river comes within the meaning of 'other public lands' in section 1 of the Act of April 9, 1913, whereby 'all public school, university, asylum, and the other public lands, fresh water lakes, islands, bays, marshes, reefs, and salt water lakes, belonging to the State of Texas,' are declared 'included within the provisions of this Act' and 'open to mineral prospecting, mineral development and the lease of mineral rights therein.'

"Had there been no statutory reservation of the beds or channels of navigable rivers, we do not think that such general language as 'other public lands' could be held to include the soil beneath navigable waters. For our decisions are unanimous in the declaration that by the principles of the civil and common law soil under navigable waters was treated as held by the state or nation in trust for the whole people. The trust impressed thereon withdraws such soil from the operation of general provisions like those of the Act of April 9, 1913, for the reason that nothing short of express and positive language can suffice to evidence the intention to grant exclusive private privileges or rights in that held for the common use and benefit. *City of Galveston vs. Menard*, 23 Texas, 390; *Rosborough vs. Picton*, 12 Texas Civ. App., 116, 34 S. W. 791; *Hynes vs. Packard*, 92 Texas, 49, 45 S. W. 562; *Wiel on Water Rights in the Western States*, Section 898."

This general principle is also alluded to in *State vs. Black Bros.*, 116 Tex. 615, 297 S. W. 213; and *State vs. Grubstake Investment Ass'n.*, 117 Tex. 53, 297 S. W. 202.

It is thus well settled that a statute of this State providing for or authorizing the grant or sale of public land, vacant public lands of the State, public free school land, and the like, do not authorize the grant or sale of lands beneath navigable waters, or within tide water limits, in the absence of some verbiage in the statutes indicating that such lands were intended to be included.

From the foregoing it might be plausibly argued that this Article 5346 of our statutes is not sufficient to authorize the sale of lands "within tide water limits," but it is our view that it comes within the exception to the rule; that is, that this article taken together with said Article 5342 sufficiently indicates that the sale of such lands were intended by the legislature to be authorized by these statutes. The land to be sold is any unpatented land belonging to the State that is "desired by the United States for any purpose specified" in the title of the statutes of which said Article 5245 is a part. The only provision in that title purporting to specify such purposes is said Article 5242. The purposes there specified are, among others, the erection and maintenance of light houses, dock yards, custom houses, the erection and construction of locks and dams, for the straightening of streams by making cutoffs, building levees, and the erection of any other structure that may become necessary in developing or improving the waterways, rivers and harbors of Texas. It is quite evident that these expressions contemplate land of the character and location appropriate for such purposes, and that our lakes and bays along the Gulf of Mexico within tide water limits are quite appropriate if not essential to at least some of these purposes, so much so that it is hardly conceivable that the Legislature could have enumerated such purposes without having in mind land of that character and location. The reason, therefore, for excluding this character of land from the statutes hereinbefore mentioned are not here applicable. It is our view that we have here although not a specific reference to and inclusion of lakes and bays along the Gulf of Mexico within tide water limits, at least a reasonable if not a necessary implication that such lands were intended. It could scarcely be imagined that a statute authorizing the sale of land for a light house, dock yards, and for structures and improvements that may become necessary in developing

the waterways and harbors of Texas, does not authorize the sale of land of the general character and location ordinarily used, and in a practical sense necessary, for such purposes. It is our opinion that these statutes authorize much sales.

While not here directly in point, we are inclined to the view that *Humble Pipe Line Company vs. State*, (Crt. Civ. Ap., error denied), 2 S. W. (2d) 1018, and that line of cases are rather in point here than the line of cases hereinbefore considered. The former pertain to the right of certain carrier corporations to a right of way upon and over tidal lands belonging to the State even in the absence of a statute granting such right as to such lands specifically.

We have considered Articles 5353 et seq., of our Revised Civil Statutes of 1925, providing for the lease of "islands, salt water lakes, bays, inlets, marshes, and reefs owned by the State within tide water limits, and that portion of the Gulf of Mexico within the jurisdiction of Texas, "for oil and gas development purposes, and Article 4026 and 4028 pertaining to the title to and right to take certain aquatic animals or products of the sea, and *North American Dredging Co. vs. Jennings* (Crt. Civ. App.), 184 S. W. 287, and do not consider that they affect the question here under consideration, except that a sale of tide water land such as is contemplated by your inquiry could not adversely affect a private right previously acquired under those statutes.

It is our opinion, therefore, and you are advised, that Article 5245 of the Revised Civil Statutes of Texas of 1925 does not authorize you to sell state public free school land, but does authorize you to sell to the United States Government for its use in the construction and maintenance of the Inter-Coastal Canal any unpatented land belonging to the State of Texas that is included in any lake or bay along the Gulf of Mexico within tide water limits.

The expression "within tide water limits" as here used includes all lands lying seaward from the line of ordinary high tide and that is covered from time to time by such tide. It will be necessary for you to satisfy yourself, and this you may do in such way as you may deem advisable, of the purpose for which this land is desired by the United States, and whether the land so sought to be acquired is included in a lake or bay along the Gulf of Mexico within tide water limits. These are matters of fact that are left to your determination.

Yours very truly,

W. W. CAVES,
Assistant Attorney General.

This opinion has been considered in conference, approved, and is now ordered recorded.

ROBERT LEE BOBBITT,
Attorney General.

Op. No. 2842.

MINERAL AWARDS.

A mineral applicant who made a location and survey and filed application on sold school land prior to March 13, 1931, is entitled to an award?

Articles 5388 to 5395, Revised Civil Statutes of 1925, authorize the location of mineral claims on land in which the State reserved the minerals in tracts not over 600 feet wide and 1500 feet long, by marking the four corners of the tract and posting notice at the middle point of one end of the tract, causing survey by the county surveyor and return of field notes along with an application for award to the Land Office. An applicant having taken these statutory steps prior to March 13, 1931, when Senate Bill 310 superseding these statutes as to such land took effect, is entitled to an award.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, April 10, 1931.

Honorable J. H. Walker, Land Commissioner, Austin, Texas.

DEAR SIR: Your letter of April 8, 1931, addressed to the Attorney General, has been duly received. Your inquiry is as follows:

“When Senate Bill No. 310 relating to the enlargement of school land sales became effective there were pending some claims under Division 2 of Chapter 5 Title 85 relating to the disposition of minerals. This begins with Article 5388 of the Revised Civil Statutes of 1925. The department had not passed on these claims at the time of the passage of the statute and no payment has been made on them, and the awards have not been issued. You will note that Article 5393 appears to provide that the locator may proceed with the development and operation of the property as soon as he posts the location. It does not appear that any payments are required until after the notice of approval of the survey is given by the Land Office. My inquiry is whether this department can issue awards on such claims and accept payments?”

Article 5388, Revised Civil Statutes, 1925, provides for the sale and patenting of all minerals in place, except oil, gas, coal and lignite, in accordance with regulations set out in succeeding articles dealing with that subject.

Article 5389 limits a mining claim to an area 600 feet wide by 1500 feet long.

Article 5390 provides the way in which a locator shall mark the lines and corners of his claim and post notice of his location.

Article 5391 provides that the locator shall, within thirty days after posting notice of his claim, file an application with the county surveyor for the survey of the claim.

Article 5392 fixed the method of surveying and marking the claim and making field notes thereof.

Article 5393 provides that the application and field notes of the area shall be filed in the Land Office within 120 days after the application to the county surveyor for survey, and that when all things have been done in compliance with the law the Commissioner shall issue to the applicant an award for the area and further that “nothing in this article shall interfere with the right of the locator to proceed with the development and operation of the property after the posting of the location, if such operation does not conflict with the mineral rights of a prior locator or owner.”

Article 5395 fixes the price to be paid at fifty (50) cents per acre annually and a royalty of two per cent of the production.

Article 5397 provides for forfeiture of the claim prior to issuance of patent if the locator fails in any respect to comply with the terms of the law.

Senate Bill No. 310, approved March 13, 1931, authorizes the landowner to lease land for mineral purposes reserving one-sixteenth (six and one-fourth per cent) of the production as a free royalty to the State. This evidently supersedes the provisions cited above as to the location of mining claims on sold school lands except in cases where vested rights had been fixed by steps taken by the locator before Senate Bill No. 310 became a law. It may be proper to scrutinize each case carefully before deciding in favor of the validity of a claim filed under the older statutes for the reason that under Senate Bill No. 310 the State receives more than three times as much royalty as was provided by the former statutes.

The Supreme Court of the United States has held that the location of a mineral claim by marking boundaries and posting notices establishes a property right in favor of the locator that may be protected by taking the subsequent statutory steps of recording applications and doing assessment work. *Butte Copper Co. vs. Clark Montana Realty Company*, 249 U. S. 12; *Cole vs. Ralph*, 252 U. S., 286.

We are unable to find any decision by a Texas court that throws light on this question but, construing the statutory provisions by their own terms and in the light of what is said by the United States Supreme Court on kindred questions, it is our opinion that claimants filing before Senate Bill No. 310 became a law, having complied with all preceding statutory requirements, are entitled to awards. We believe, however, that it will be necessary for a mineral claimant to show location, posting notice, marking corners with monuments, survey and return of field notes and the filing of application and field notes in the Land Office in the manner and within the time required by the statutes referred to before he is entitled to an award, and that all such required steps must have been taken prior to March 13, 1931.

None of the various statutes under which public school lands have heretofore been sold with minerals reserved by the State have reserved the right to use the surface of the land for mining purposes. It will, therefore, be necessary for the mineral claimant to deal with the landowner as to the right of ingress and egress as to any damage that may be done to the surface. It might be well to call their attention to this fact in order to avoid misunderstandings in the future.

Yours very truly,

GEO. T. WILSON,
Assistant Attorney General.

OPINIONS RELATING TO SCHOOLS AND SCHOOL DISTRICTS

Op. No. 2861.

FREE TEXT BOOKS—SCHOOL TRUSTEES—LIABILITY OF AND INSURABLE
INTEREST IN FREE TEXT BOOKS—POWER OF STATE SUPER-
INTENDENT TO REQUIRE LOCAL DISTRICTS TO INSURE-
FREE TEXT BOOKS.

1. School trustees as legal custodians of State owned free text books consigned to them are liable for any loss of any books by fire, etc., occasioned by their negligence or default; but are not absolutely liable as insurers for any loss not suffered through any negligence or default on their part.

2. School trustees as legal custodians of State owned free textbooks consigned to the their districts have an insurable interest in such books.

3. The State Superintendent of Public Instruction, with the approval of the State Board of Education, is authorized by existing statutes to require school districts to carry fire and tornado insurance on state textbooks consigned to such districts while such books remain in their possession.

4. Existing policies are not invalid because made in the name of the district or the trustees and because it is not stated thereon that the books are the property of the State, and premiums paid upon such policies cannot be recovered on that theory. Such trustees, having an insurable interest, may sue upon such policies for any loss sustained, any recovery had thereon being for the use and benefit of the State.

5. Insurance companies insuring free text books consigned to school districts are charged with knowledge of the general laws providing that ownership of said free text books remains in the State, and the failure of a policy of insurance to state that fact is no defense to an action to recover on such policy.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, July 16, 1931.

*Honorable S. M. N. Marrs, State Supt. of Public Instruction, Austin,
Texas.*

DEAR SIR: Your letter of recent date, addressed to Attorney General James V. Allred, in which you request the opinion of this department upon certain points concerning the free text book laws of this State, has been received and referred to the writer for answer. Your five numbered questions will be copied and answered herein in the order in which asked by you.

Your first question is as follows:

"1. Does the legal responsibility of school trustees as set forth under Articles 2872, 2873 and 2874 include the accounting for all books consigned to their district by the State? If so, does this liability extend to accounting for all books destroyed, lost, burned by fire, etc.?"

We quote the following provisions of the 1925 Revised Civil Statutes of Texas, which are pertinent to the question asked:

"Art. 2872. Custodians—The School trustees of each district shall be designated as the legal custodians of the books and shall have the power to make such arrangements for the distribution of books to the pupils as they may deem most effective and economical; provided, that no district shall have the power to make any regulations in regard to text books which is at

variance with the provisions of this Act, or with the regulation of the State made by the State Superintendent of Public Instruction and approved by the State Board of Education."

"Art. 2873. Property of State—Books shall remain the property of the State, and after purchase through requisition according to the provisions of this Act, shall remain in the charge of the district school trustees as the legal custodians of the books. The district school trustees shall have the power to delegate to their employees such power as to requisitions and distributions of books and the management of books as in their judgment may be best; provided, that such plans shall not be at variance with the provisions of this law, or with the State Rules for Free Text Books formulated by the State Superintendent of Public Instruction and approved by the State Board of Education."

"Art. 2874. Trustee's Bond—One or more members or employees of each district board of trustees shall enter into bond in the sum of fifty per cent in excess of the value of the books consigned to them by the State, payable in Austin, Texas, to the Governor of the State of Texas, or his successors in office, said bond to be approved by the county judge of the county in which the school is situated, and by the State Superintendent of Public Instruction, and deposited with the State Superintendent, conditioned on the faithful discharge of his duties under his employment and under this Act, and that he or they will faithfully account for all books coming into his or their possession and for all moneys received from the sales thereof; provided, that all moneys accruing from their forfeiture of the bonds shall be deposited by the Governor to the credit of the State Text Book Fund."

"Art. 2876b. Rules by Superintendent—Specific rules as to the requisition, distribution, care, use and disposal of books may be made by the State Superintendent of Public Instruction, subject to the approval of the State Board of Education; provided, that such rules shall not conflict with the provisions of this Act, or with the uniform text book law under the terms of which contracts for supplies and books are made with the publishers or with the terms of said contract. . . ."

It will be noted that Article 2872 provides that the school trustees of each district shall be designated as the legal custodians of the books. Article 2873 provides that the books shall remain the property of the State and remain in charge of the district school trustees as the legal custodians of the books, and Article 2874 provides that *one or more members or employees* of each district board of trustees shall enter into bond * * * conditioned on the faithful discharge of his duties and that *he or they* will faithfully account for all books coming into his or their possession and for all moneys received from the sales thereof. The form of bond now used by the State Department of Education (copy of which was furnished by you) shows that it is to be executed by those persons selected by the local board of school trustees, and placed in charge of the distribution and management of the free text books, and is conditioned that the makers of the bond, "shall faithfully discharge all of their duties under such employment and under the Act of the Legislature aforesaid, and shall faithfully account for all books coming into their possession, and for all moneys received from the sale of such books, as fines on damaged books, and as insurance on books destroyed." In an opinion of this department dealing with said bonds, dated April 16, 1919, addressed to Miss Annie Webb Blanton, State Superintendent of Public Instruction, printed Reports of Attorney General 1918-20, page 490, Hon. C. W. Taylor, Assistant Attorney General, said:

"They (the trustees) having selected the persons to have charge and

management of the books, then the Act requires that such persons enter into the bond above described. Such bond would be the individual undertaking of the parties executing it, and would not be the obligation of the district. To hold that such a bond was the obligation of the school district and not of the individual principals thereon would destroy the very purpose of the bond, *to make the persons having charge of the books responsible for their distribution and safe keeping.*" (Italics ours)

Bulletin No. 278 of the State Department of Education, being No. 1 of Vol. VII, styled "Revised Text Book Regulations" and dated January, 1931, provides (pages 36 and 37) that if a child loses or damages a book he must pay therefor according to the condition of the book when lost or damaged, and if damaged, according to the damage done. It is further provided (p. 37) that:

"Superintendents should use discretion in assessing fines. A pupil should not be charged for books that health officers require destroyed because of contagious disease, or for those burned in the loss of a home by fire, or for those lost in other nonpreventable accidents.

"If a pupil or his parent or guardian refuses to pay the fine on a lost or damaged book, the pupil should be deprived of the benefit of free text books until the fine is paid. Reasonable wear is to be expected and should not be penalized."

and further in Section 4, page 37:

"It is not the intention of the law that a trustee or his representative giving bond should be required to replace books lost or damaged by pupils. *The purpose of the bond is to make sure that all boards will see that responsible persons are selected as consignees of the books.* (Italics ours) The custodian to whom the books are to be shipped must be under bond before requisitions for books will be honored by this department."

In our opinion the regulations of the State Department of Education are reasonable and in keeping with the spirit of the above quoted statutes. As stated in the regulations now in use in your Department, the object of Article 2874 in requiring bond is to see that responsible persons are selected as custodians. That requirement was not intended to extend the liability of the trustees as fixed by their status as "legal custodians" of the books. They remain the legal custodians, though an actual custodian is selected and bonded by them in accordance with the provisions of Article 2874. The actual custodian, with his bondsmen, then becomes liable for any negligence or default on his part. The liability of the trustees for any negligence on their part is not released by the furnishing of the bond, but remains as it was before. Both the legal custodians and the actual custodian are required to account for the books, and for any sums collected by them respectively for fines, sale price of books, etc. It is our opinion, and you are so advised in response to the first inquiry in your first numbered question, that the legal responsibility of school trustees for free text books does include the accounting for all books consigned to their district by the State.

In the second inquiry contained in your first numbered question you desire to know whether this responsibility of the trustees is such as to make them liable in case books are destroyed, lost, burned, etc. Your inquiry makes no distinction between accidental loss, loss caused

by negligence, and loss caused by intentional default. These distinctions are vital and fundamental in determining the liability of any person in any case, and must be borne in mind in determining the legal liability of any man for any loss suffered. It has been held by the Supreme Court of this State that an officer for hire intrusted with the duty of collecting public money is absolutely liable for the same and must account fully and cannot "lose" it. *Boggs vs. State*, 46 Texas 10; *Wilson vs. Wichita County*, 4 S. W. 67. The two cases cited deal with a tax collector and a county treasurer, respectively, both of whom are bonded to pay over all monies coming into their hands. They are officers for hire, and from the very nature of the offices they hold, (aside from the bonds required to be furnished) the safety of public funds makes it imperative that they be held absolutely liable for money collected by them. The case of a school trustee who is made by law the "legal custodian" of free State text books is vastly different. He receives no compensation, he is not under bond. He was not elected primarily to handle free text books, but that duty was thrust upon him by comparatively recent statutes. By the regulations of your Department he cannot collect from a pupil whose book is destroyed by accidental fire, and yet if his liability for an accounting were an absolute liability, he would be compelled to pay for that book accidentally burned while in possession of that pupil, and which was placed there by the State for the benefit of the State and the pupil, not the trustee. Such a holding would be contrary to reason, unintended by the statutes, and not justified by existing rules of law. A trustee, one of the legal custodians of the books, has discharged his duty when he accounts for the number of books coming into his possession by returning the books, the sale price thereof, or else shows that they were lost or destroyed through no fault of his own. The same rule of reason with regard to loss of a book by a pupil, which is now in force in your department, applies in case of a trustee. There might be a basis, under the wording of Article 2876c of the Statutes, for holding a pupil liable for all books delivered to him, but such language is not used when defining the duties of a trustee, and your Department has construed the law otherwise as applied to a pupil. The trustee must "account" for the books—show what became of them, how many are not returned, the reason therefor, and if books are lost through his negligence or default he must pay therefor. And once he sells books, receiving money therefor, or collects fines on damaged books, he must account absolutely for such money. Your regulations (sec. 1, p. 36) following Article 2874, require that all sales and collections be reported within thirty days. If this be complied with, loss by a trustee from this source will be exceedingly rare. A school trustee is in fact as well as in name a trustee—not an insurer.

In response to the second inquiry of your first numbered question, you are advised that a school trustee as one of the legal custodians of State free text books consigned to his district, is not absolutely liable as an insurer, but that he is liable for any loss of books caused by his negligence or default.

"2. Does each school district through its officers have an insurable

interest in textbooks loaned to the district by the state and for which they are bonded to the state in an amount 50% in excess of the value of such books?"

The general rule with regard to insurable interest of custodians of property is announced in Cooley's Briefs on Insurance (2d Ed.), one of the best known and most often quoted of the recent works on insurance law. The rule is there announced (pp. 246, Vol. I) as follows:

"In *Hartford Fire Insurance Co. vs. Evans* (Tex. Civ. Apps.) 255 S. W. 487, it was held that a cotton gin operator, who stored cotton owned by other persons with a compress company and held the compress tickets, had an insurable interest in the cotton, entitling him to insure it in his own name for the benefit of himself and the beneficial owner.

"From the foregoing rule as to bailees generally, it may be deduced that though a warehouseman has no pecuniary interest in goods in his possession and is not liable for their loss by fire, yet he has a general insurable interest enabling him to insure them as his own.

"This is the rule laid down in *Home Ins. Co. vs. Minneapolis, St. P. & S. M. Ry. Co.*, 71 Minn. 296, 74 N. W. 140; *Pelzer Mfg. Co. vs. Sun Fire Office* 36 S. C. 213, 15 S. E. 562; *Dawson vs. Waldheim* 80 Mo. App. 52; *Shepard vs. Peabody Ins. Co.* 21 W. Va. 368; *Carter vs. Humboldt Fire Ins. Co.* 12 Iowa 287; *Eastern Railroad Co. vs. Relief Fire Ins. Co.* 98 Mass. 420; *Fire Ins. Ass'n, Limited, vs. Merchants & Miners Transp. Co.* 66 Md. 339, 7 Atl. 905, 59 Am. Rep. 162; *Lewis vs. Home Ins. Co.* 110 Misc. Rep. 592, 181 N. Y. S. 839; *Hamburg-Bremen Fire Ins. Co. vs. Lewis*, 4 App. D. C. 66."

It will be noted that one of the leading cases on this doctrine is a Texas case (*Hartford Fire Ins. Co. vs. Evans*, 255 S. W. 487). Attention is also directed to the case of *People vs. Liverpool & London & Globe Ins. Co.* 2 Thomp. & C. (N. Y.) 268, where it was held that possession, coupled with a right of beneficial use, supported an insurable interest. In that case the trustees of an asylum attempted to convey such asylum to the people. The State went into possession, and though without title, was held to have an insurable interest.

Aside from this narrow ground, it should be remembered that the rule requiring an insurable interest is a rule founded on public policy—the policy being to prevent wagering contracts and to remove any incentive to intentional destruction which a profit in loss of another's property might otherwise create. As pointed out in the case of *Hartford Fire Ins. Co. vs. Evans*, supra, there are cases in which the rule is inapplicable, or more correctly stated, cases in which public policy directs that an insurable interest be had. Such, it seems to us, is the case with the State's free text books. It would be a strange "public policy" which would decree that it was adverse to the best interest of the State to permit the officers in custody of State property to insure the same for the State for safe keeping. Any such insurance would be for the State's benefit, regardless of whether the names of the trustees or the name of the school district were inserted in the policy, and any recovery had thereon would be for the State's use and money so recovered by any trustee would be in trust for the State. It is, therefore, our opinion, and you are so advised, that the trustees, the

legal custodians of the books, have an insurable interest in books consigned to their school district by the State.

"3. In the absence of any prohibitive statutes, may the State Board of Education or State Superintendent of Public Instruction under the provisions of Article 2876 B, require school districts to carry fire or tornado insurance on textbooks assigned to such districts while such books remain in their possession?"

Article 2876 B expressly authorizes the State Superintendent of Public Instruction to make specific rules as to the requisition, distribution, *care*, use, and disposal of books, provided such rules shall not conflict with any provision of the free text book act, and shall be subject to the approval of the State Board of Education. Such rules must, of course, be reasonable. Section 17, p. 41, Bulletin No. 278, supra, recommends that insurance be carried on the free textbooks, but the carrying of such insurance is not made obligatory by your present rule. It is our opinion that the requirement mentioned by you is reasonable and that you, with the approval of the State Board of Education, may require school districts, through their trustees, to carry such insurance on textbooks consigned to such districts while the books so consigned remain in their possession.

"4. If it is held that the state may hold legal custodian of textbooks in each school responsible for the safe-keeping and accounting for such books, and may require insurance to be carried, must the insurance policy specifically state in each case that the books are the property of the State of Texas, held in trust by the district? If it is held such policy must be so worded in order to be legal and enforceable, may the school districts recover all premiums paid on policies now in force which are not so worded? As an example, in some of the larger cities, insurance in large amounts is carried by the district on the state owned free textbooks, and premiums have been paid on these policies over a long period of years. If these policies are not valid, the district is certainly entitled to recovery of the premiums paid as they have not, in fact, had any protection."

The insurance carried should be in favor of the State, and the policy should state that the books are the property of the State. In our opinion you are authorized by existing statutes to require this insurance to be carried in the name of the State. The policy will, of course, show where the books are located, and should be broad enough to include any books requisitioned and added to any local stock during the year the particular policy is in force. You are further authorized to make rules requiring the various policies of insurance to be mailed to you for inspection and approval, this being necessary to any effective enforcement of a rule requiring insurance to be carried. It would be analogous to the present procedure in your department with reference to bonds of custodians having actual charge of the books. In the event the policy covers personal property belonging to the district, in addition to the State's textbooks, the policy should be in favor of the State and the district, as their respective interests may appear.

We recommend that the policy specifically state that it is favor of the State, but this recommendation is not to be understood as in anywise varying our opinion expressed in answer to your question

number two concerning the insurable interest of the trustees. A policy is not void or voidable on that ground if issued to the district or the district trustees. They have an insurable interest, though not ownership, and may insure the books and recover for any loss suffered thereby, the recovery being for the benefit of the State and to be paid to the State, in accordance with the requirements set forth in the bond of the actual custodian. This is a general and well settled rule of insurance law. Once an insurable interest exists, the property may be insured by the person who has the insurable interest, and the policy may be sued upon and a recovery had, such recovery being for the benefit of the real owner. *Hartford Fire Ins. Co. vs. Evans*, 255 S. W. 487; *Allison, Bailey & Co. vs. Phoenix Ins. Co.* 87 Tex. 593, 30 S. W. 547. Since these policies issued in the name of the district or the trustees are valid and enforceable, no recovery can be had for premiums paid on the theory that the policies are invalid and that no protection has been had.

Mr. R. D. Henderson, Manager of the Text Book Division of your Department, states that in only a few isolated instances have insurance companies sought to defeat recovery on these policies on the ground that the district or the trustees had no insurable interest in the books. There is no reasonable basis for the contention made by these few litigious companies, but the requirement that the insurance be in the name of the State would remove even this shadowy contention and would expedite recovery in all cases.

"5. In the case of fire losses recently sustained, is the state entitled to recover the value of such books covered by policies which did not specifically state the books were the property of the state, held in trust by the district, where such omission was apparently made by the agent? Would it be held that it would be prima facie evidence that the agent knew that the textbooks so insured were, in fact, the property of the state and merely held in trust by the district by virtue of the fact that free textbooks have been furnished for more than ten years and all citizens are aware of this fact?"

It is immaterial that the policies do not state that the books are owned by the State, or that the interest of the trustees was other than unconditional and sole ownership. The laws pertaining to free textbooks are general statutes, binding alike on all citizens and persons, natural or artificial. No man can plead ignorance of the law to defeat a recovery on a contract, and this rule would be applied with its usual force in case of insurance companies. The policies are issued with reference to the law in force at the time of issuance. The laws in force charge all men contracting under them with notice of the fact that ownership of free public school textbooks remains in the State, and the insurance company is as cognizant of that fact as is the local board of trustees. The contracting public can no more plead ignorance of the ownership of the State under these circumstances, while dealing with duly elected or employed officials or agents of the State, than it could the lack of knowledge of the ownership in the State of the University at Austin.

The State is a proper party to any suit to recover on any policy of insurance issued on State owned textbooks, and in event the policy

be issued to a local district or local trustee, the State may join in a suit to recover thereon. For authority for the various statements made in answer to your fifth numbered inquiry, see the able opinion of Mr. Justice Brown in *Wagner & Chabot vs. Westchester Fire Insurance Co.*, 92 Tex. 549, 50 S. W. 569. Authorities are numerous on all common points of insurance law, and for that reason we have not sought to burden this opinion with excessive citations; suffice to say that the general statements made herein are sustained by abundant authority. We have sought to put this opinion in such form as to be of most assistance to you in drafting the administrative regulations contemplated by your Department.

Very truly yours,

R. W. YARBOROUGH,
Assistant Attorney General.

**OPINIONS RELATING TO PUBLIC OFFICERS'
FEES AND COMPENSATION**

Op No. 2819.

CENSUS—POPULATION—COUNTY SUPERINTENDENT—SALARY.

The respective provisions of Chapter 266, Section 1, and Chapter 267, Section 1, Regular Session, Fortieth Legislature, 1927, making provision for salary of County Superintendents, depend upon population in certain counties, and construing the phrases appearing in each of said acts respectively "according to the last preceding Federal Census," and "according to the last Federal Census," and the effect thereof relative to the fixing of said salary and compensation according to the Fifteenth Federal Census as officially announced by the Director of Census, and each subsequent census as it occurs.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, January 17, 1931.

Honorable S. M. N. Marrs, State Superintendent, Austin, Texas.

DEAR SIR: The Attorney General is in receipt of yours of the fifteenth instant, and has assigned the same to me for reply, which reads as follows:

"It has become necessary in this office to construe the meaning of the language found in Section 1, Chapter 266, General and Special Laws of the Regular Session of the Fortieth Legislature. You will note that the expression occurs "according to the last preceding Federal Census." When this act was passed, Dallas County was the only one to which it applied, but since the census has been obtained for 1930 Bexar County and Harris County have the prescribed population. Question: Does Chapter 266, General and Special Laws, Regular Session of the Fortieth Legislature, now apply to Harris County and Bexar County as well as Dallas County?

"I wish now to refer you to Section 1, Chapter 267, General and Special Laws, Fortieth Legislature, Regular Session. In this section we find the expression "according to the last Federal Census." When this act was passed, it applied only to Wichita County, as by the Federal Census of 1920 it was the only county in Texas whose population fell between 60,000 and 73,000. According to the Federal Census of 1930, Galveston, Grayson, and Navarro Counties have a population which falls between these two limits and Wichita County exceeds the 73,000. Question: Does Chapter 267 now apply to Galveston, Grayson and Navarro Counties and not include Wichita County, for which it was specially enacted?"

Chapter 266, Acts 1927, Fortieth Legislature, page 393, being Senate Bill No. 394, approved April 1, 1927, effective ninety (90) days after March 16, 1927, which act appears as Article 2700a, Revised Civil Statutes, 1925, reads as follows, to-wit:

"Section 1. That the salary of the Superintendent of Public Instruction in all counties in Texas having 210,000 population or more according to the last preceding Federal Census, shall be from and after the passage of this act the sum of \$4800.00 (forty-eight hundred dollars) per annum and the same is fixed by this act at the sum.

"Section 2. In making the annual per capita apportionment to the schools the county school trustees of all counties having 210,000 popula-

tion or more according to the last preceding Federal Census shall also make an allowance out of the State and County available school funds for the payment of the salary of the Superintendent of Public Instruction of all counties having 210,000 population or more according to the last preceding Federal Census \$4800.00 (forty-eight hundred dollars) and office expenses in any sum not exceeding \$600.00 (six hundred dollars) per annum for stamps, stationery, expressage, and printing incidental to and necessary in the administration of his office, and shall be prorated to the schools in said county in proportion to the scholastic population of each district or community in the county that is under the jurisdiction and supervision of said county superintendent. And the commissioners' court of all counties having population 210,000 or more according to the last preceding Federal Census may spend out of the general fund of said county any sum not exceeding the sum of \$900.00 (nine hundred dollars) per annum to defray the traveling expenses of the county superintendent.

"Section 3. The salary and expenses for stamps, stationery, expressage and printing provided herein shall be paid monthly upon the order of the county school trustees; provided that the salary for the month of September shall not be paid until the said Superintendent of Public Instruction shall have presented a receipt or certificate from the State Superintendent of Public Instruction showing that he has made all reports required of him. That the traveling expenses provided for herein shall be paid monthly by the County Treasurer on order of the Commissioners' Court as said expenses may be incurred.

"Section 4. All laws or parts of laws heretofore enacted which are in conflict herewith are hereby repealed."

Chapter 267, Acts 1927, Fortieth Legislature, page 394, being Senate Bill No. 469, approved April 1, 1927, effective ninety (90) days after March 16, 1927, brought forward and appearing as Article 2700b, Revised Civil Statutes, 1925, reads as follows:

"Section 1. That the salary of the County Superintendent of Public Instruction of each county in Texas having a population of not less than 60,000 nor more than 73,000 according to the last Federal Census, shall from and after the passage of this Act be not less than the sum of \$2800.00 per annum nor more than the sum of \$3800.00 per annum.

"Section 2. In making the annual par capita apportionment to the schools of the counties having a population of not less than 60,000 nor more than 73,000 the County School Trustees shall also make annual allowance out of the State and County Available Funds for the payment of the salary of the Superintendent of Public Instruction not less than \$2800.00 nor more than \$3800.00 and office expenses in any sum not exceeding \$200.00 per annum for stamps and stationery; and the Commissioners' Courts of the Counties having a population of not less than 60,000 nor more than 73,000 may expend out of the general funds of said counties any sums not exceeding the sum of \$600.00 per annum to defray the expenses incurred by said County Superintendent which said sum shall be paid by said Commissioners upon certificate of said Superintendent that the expenses have been incurred in the discharge of his duties as such Superintendent.

"Section 3. The salary to be paid monthly upon the order of the school trustees; provided, that the salary for the months of September shall not have been paid until the Superintendent of Public Instruction shall have presented a receipt or certificate from the State Superintendent of Public Instruction showing that he has made all reports required of him; that the expenses provided for herein shall be paid monthly by the County Treasurer on the order of the Commissioners' Court.

"Section 4. All laws or parts of laws heretofore enacted which are in conflict are hereby repealed."

It will be noted in the construction of both of said acts that in providing for the payment of salary and expenses by the County School Trustees the word "shall" is used, but in providing for the payment of certain expenses in both of said acts by the Commissioners' Court out of the general fund of the counties coming within the provisions of said acts the word "may" is used, except in the sentence in Section 3 of Chapter 266, is used the word "shall" in providing for the payment of expense on the part of the Commissioners' Court. In statutory construction the use of the word "shall" is interpreted in the sense that it is "mandatory," and the word "may" is merely permissive, discretionary or directory.

Section 4 of each of said acts, as will be noted, repeals all laws or parts of laws which are in conflict with said respective acts, therefore, said acts amend, repeal and supersede Article 2700, Revised Civil Statutes, 1925, or so much of said statute as is in conflict with said amending acts, being the original law providing for the salary and compensation of county superintendents of public instruction in the various counties of certain populations.

Construing the expression "according to the last preceding Federal Census," as same is used in Chapter 266, Acts 1927, Fortieth Legislature, page 393, being Article 2700a, Revised Civil Statutes, 1925, refers to the official United States decennial census, as published and distributed by the Director of Census, which immediately precedes in point of time the fixing of the salary or the amount thereof, within the provisions of each respective act, of the County Superintendent of Public Instruction by the County School Trustees, and each such subsequent census.

Paragraph 8 of Article 23, Revised Civil Statutes, 1925, defines the expression "last preceding Federal Census" as follows:

"'Preceding Federal Census' shall be construed to mean the United States census of date preceding the action in question and each such subsequent census as it occurs."

In the case of *State vs. Brown*, reported in Vol. 106, page 477, *Northwestern Reporter*, the phrase was defined as follows:

"The Statute provided that: 'Whenever the common council in any city of this State having at the last preceding State census more than fifty thousand (50,000) inhabitants shall consider it necessary to procure grounds for a public market, such common council shall appoint a committee, etc.' It was contended that the census referred to was the one 'last preceding' the enactment of the law, and that therefore no cities could in the future enter the class by increase of population; but it was held that the words 'last preceding' referred to the State census which might immediately precede in point of time the action of the council and that the law was therefore general."

In the case of *Bishop vs. City of Tulsa* reported in Volume 202, *Pacific Reports*, page 228, construing the clause "as determined by the last preceding census," the court said "we think the act means the census next preceding the organization of the court, and that it is prospective, as well as retrospective, in its operation."

The clause "according to the last Federal census" is construed as

equivalent and analogous to the phrase "according to the last preceding Federal census" as used in these Acts respectively, and has the same legal meaning and effect.

The provisions of both acts in designating the time of fixing the salary of said County Superintendent by the County School Trustees, in almost identical language, provide "that in making the annual per capita apportionment to the schools, the county school trustees * * * shall also make allowance out of the State and County available school funds for the payment of the salary of the Superintendent of Public Instruction * * * etc," and the time of making the apportionment of said funds is fixed by Article 2685, Revised Civil Statutes, 1925, and reads as follows:

"Upon receiving notice from the State Superintendent of the amount of State Available School Funds apportioned to the county, exclusive of all independent districts having each more than one hundred and fifty scholastics, the county school trustees, acting with the county superintendent, shall apportion all available State and County funds to the school districts as prescribed by law."

The provisions of Article 6824 of the Revised Civil Statutes, 1925, expressly provide that "the salaries of officers shall not be increased nor diminished during the term of office of the officers entitled thereto," is a legislative declaration, there being no provision of like effect in our Constitution, and it has been held in numerous cases and decisions of our courts that the salary or compensation of a county officer, where such salary is not fixed by law, but the fixing of which is vested in the Commissioners' Court, may be increased or diminished during the term of such officer, has been expressly decided.

Collingsworth County vs. Myers, 35 S. W. 414;

Orr vs. Davis. 30 S. W. 249;

Bastrop County vs. Hearn, 8 S. W. 202;

Arnold vs. Cass County, 289 S. W. 749.

That a salary or compensation fixed at a definite sum by legislative enactment, although not so fixed by the Constitution, cannot be increased or diminished by any other than legislative authority during the term of office or otherwise, is too evident to require a discussion of the citation of authorities, but that even such salary or compensation so fixed, but not being so fixed by the Constitution, may be increased or diminished by legislative enactment, even during the term of the officer then serving, is clearly established. This is evidenced not only by the cases herein cited to that effect, but also by the acts now under consideration, as well as by numerous other acts of the general laws. That the salaries of the Judges of our Supreme Court, Courts of Civil Appeals and District Courts were increased by Chapter 32, page 54, of the General Laws of the Regular Session of the Thirty-sixth Legislature, during their terms of office and was held a valid act by the Court of Civil Appeals in the case of King vs. Terrell, 218 S. W. 42, a writ of error refused by our Supreme Court without written opinion.

Hence we conclude that this Article 6824, Revised Civil Statutes, 1925, of whatever significance, if any, it might have in another matter,

can have no effect whatever in the matter of decreasing or increasing the salary of the County Superintendents, within proper bounds by proper authority during his term of office. That the Legislature has the right to fix by law compensation of such officers, same not being fixed by the Constitution, is expressly declared by Section 44 of Article 3 of our Constitution, and that in so doing it may increase or diminish such compensation during the term of such officer is evident from what has already been said.

By said Chapters 266 and 267, stated in your inquiry, the Legislature has fixed the compensation of such officers, as it has done from time to time heretofore, at an annual salary, payable as stated in the acts, the amount of salary varying in different counties according to the population, and the fact that an increase or decrease of population in a particular county may occur during the term of an officer and thereby work an increase or decrease in salary of such officer during his term is no bar to such law becoming effective during such term.

That our Legislature may enact a law to become effective within a given county, or other district or territory, only when the population of such county, or other district or territory, has reached a certain number, otherwise to remain inoperative as to such county, or other district or territory, is well understood. There is no reason, therefore, why Articles 2700a and 2700b, being Chapters 266 and 267, respectively, as same appear in the Revised Civil Statutes of 1925, should not become operative or take effect as to counties of this State coming under their provisions in the matter of population, or to the contrary why they should not become inoperative or to no effect as to counties of this State not coming under their provisions in the matter of population as said populations are disclosed by the Fifteenth Decennial Census, on each such subsequent census as it occurs.

We conclude, that upon the official publication of the decennial United States census of 1930, and all subsequent census as it occurs, that all counties, whether by reason of increase or decrease in population as disclosed by said official census as published or distributed by the Director of Census, coming within the provision of said Articles 2700a, Chapter 266, Regular Session, Fortieth Legislature, 1927, and 2700b, Chapter 267, page 394, Acts Regular Session, Fortieth Legislature, 1927, as to population, respectively, that said articles or acts become operative as to such counties in the matter of governing the fixing of said salaries and expenses of County Superintendents of Public Instructions by the respective Board of School Trustees, and Commissioners' Courts may make such appropriations out of the general fund in accordance with the provisions thereof immediately upon notice of such official disclosure of population bringing said counties within the population provision of said articles; however, said publication of population would not affect the salary of said County Superintendent as previously fixed by said Boards in accordance with the preceding Federal Census, and would only control in the matter of fixing any future salary or compensation by said board. That any county or counties by reason of increase or decrease in population as disclosed by the official publication of said census not coming within the provisions of said acts or either of them as to population

is without their provisions and as to said county or counties said acts are inoperative and of no effect.

The Board of School Trustees of the county or counties coming within the provisions of said acts or either of them, shall be governed by the provisions of the act under which said county is placed by reason of increase or decrease in population as disclosed by the official census report, which immediately precedes in point of time the fixing of said salary, compensation or expense allowance by said board of trustees, which as hereinbefore set forth is the time said Board of School Trustees makes its annual per capita apportionment to the schools of the county.

Respectfully submitted,
SCOTT GAINES,
Assistant Attorney General of Texas.

Op. No. 2825.

DELINQUENT TAXES—ASSISTANTS EMPLOYED TO COLLECT—LIMITED
DUTIES OF, IN COUNTIES LESS THAN 150,000 POPULATION

1. In counties under 150,000 population, attorneys employed by Commissioners' Court to assist county attorney in collection of delinquent taxes cannot be assigned to other duties of the office.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, January 29, 1931.

Hon. Wm. C. Culp, County Attorney, Gainesville, Texas.

DEAR SIR: Attorney General Allred received your letter of January 16, reading in part as follows:

"Could the Commissioners' Court in counties under 150,000 population employ an assistant County Attorney to aid the County Attorney in collection of taxes AS WELL AS OTHER DUTIES THAT MIGHT BE ASSIGNED BY THE COUNTY ATTORNEY, and allow said assistant a salary from the general fund?"

You refer to Article 3886, Revised Civil Statutes, 1925, as amended by the Act of the Fourth Called Session of the Forty-first Legislature. Chapter 20, Section 2, page 31. You further state that Cooke County has a population of 24,141, according to the official United States census for 1930.

The second paragraph of Article 3886, as amended provides that:

"The criminal district attorney or county attorney of any county with a population exceeding one hundred fifty thousand (150,000) inhabitants, shall have the right to appoint, in addition to those now provided by law, not more than two (2) assistant county or district attorneys, . . . for the purpose of assisting the said attorney in performing his duties with reference to the collection of delinquent taxes and such other duties that might be assigned by the district or county attorney, such salaries to be paid out of the general fund of the county; provided, in counties under one hundred fifty thousand (150,000) population, the county attorney, with the approval of the Commissioners' Court, may employ not more than one assistant at a salary not to exceed two hundred fifty (\$250.00) dollars per month for the purpose of assisting the county attorney in performing

his duties with reference to the collection of delinquent taxes, which salary shall be paid out of the county general fund, and the services of said assistant may be dispensed with at any time by the Commissioner's Court."

The first clause of the paragraph just quoted grants to county and district attorneys of large counties the right and authority to appoint two assistants to aid in the collection of delinquent taxes, and in addition thereto, provides that other duties of office may be assigned to them. The second clause, beginning with the word "provided," and applying to counties of less than 150,000 population, authorizes the county attorney to employ not more than one (1) assistant. He may do so, however, only with the approval of the Commissioners' Court, and the services of such assistant may be dispensed with at any time in the discretion of the court. The language used in this proviso is clear to the effect that the duties of such assistant must be limited to assisting the county attorney in the collection of delinquent taxes. The second clause expresses a limitation upon the words used in the first clause. In this instance it limits and restricts the grant of authority conferred upon the county and district attorneys of large counties when applied to counties of less than 150,000 population. (See proviso and PROVIDED in words and phrases, Third Series, pages 311, 305)

It is the opinion of the department, and you are so advised, that in counties under 150,000 population, an attorney employed pursuant to the provisions of Article 3886, as amended, for the purpose of assisting in the collection of delinquent taxes, and paid out of the general fund of said counties, cannot be assigned to other duties of the office.

We reserve any expression of opinion touching the circumstances under which the Commissioners' Court would be authorized to appoint such an assistant, and under which such an assistant would be empowered to act for the county attorney in the collection of delinquent taxes.

Very truly yours,

ELBERT HOOPER,
Assistant Attorney General.

Op. No. 2826.

TAX COLLECTORS—EXCESS FEES.

1. Unless specially excepted, fees and compensation of office must be accounted for.
2. In cases of doubt, construction should be in favor of the state.
3. Tax collectors shall account for excess of compensation allowed by Section II, Chapter 88, Page 172, Acts of the Second Called Session of the Forty-first Legislature.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, February 5, 1931.

Hon. Willard McLaughlin, District Attorney, Waco, Texas.

DEAR SIR: We have your letter inquiring whether tax collectors

shall account for fees collected during the year 1930 under the provisions of Section 11, Chapter 88, page 172, Acts of the Second Called Session of the Forty-first legislature. Your attention is directed to the fact that the section in question took effect on, and was in force from and after, January 1st, 1930. The fees in question originally were referred to in Article 6692, Revised Civil Statutes of Texas, 1925, but this article was expressly repealed by Section 16 of the Act above cited.

Specifically, the question presented is whether tax collectors are authorized to retain any excess of compensation allowed them for issuing license receipts, number plates, chauffeur badges, after paying the cost of labor performed and all expenses connected therewith, or whether any such excess shall be accounted for as fees of office as provided by law.

We are of the opinion and you are so advised that such excess shall be accounted for as fees of office and reported as provided by law for other fees.

Fees or compensation not specially mentioned as excepted from laws requiring officers to account for same must be accounted for as fees of office. (*Ellis County vs. Thompson*, 66 S. W. 48). When the compensation of a public officer is left to construction, it must be most favorably construed in favor of the state. (*Eastland County vs. Hazel*, 288 S. W. 521. See other authorities there cited.) In view of the fact that the compensation in this instance is not specially excepted from the operation of the laws of this state fixing maximum fees, we think the authorities cited settle the question.

Very truly yours,

ELBERT HOOPER,
Assistant Attorney General of Texas.

Op No. 2833.

COUNTY JUDGE—FEES OF OFFICE—EX-OFFICIO COMPENSATION.

1. In counties containing as many as 25,000 and less than 37,500 inhabitants, *in which there is no city containing over 25,000 inhabitants*, the county judge is limited to the total sum of Four Thousand, Five Hundred (\$4,500.00) Dollars.

2. The amount of ex officio compensation that may be allowed the County Judge in counties containing as many as 25,000 and less than 37,500 inhabitants, *in which there is no city containing over 25,000 inhabitants*, cannot exceed an amount which will increase the total compensation, including ex officio compensation, beyond Four Thousand, Five Hundred (\$4,500.00) Dollars.

3. County Judge not authorized to remit all fees derived from office to county funds and draw a straight salary from Commissioners' Court.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, February 5, 1931.

Hon. F. X. Joerger, County Judge, Richmond, Texas.

DEAR SIR: Your letter of February 3rd addressed to the Attorney General has been referred to the writer for attention. You submit the following for an opinion:

When I took office as County Judge of Fort Bend County, on January 1, 1929, the salary of the County Judge was \$287.50 per month. That is the salary my predecessor had been receiving for two years prior to my election. The fees due the County Judge are paid into the General Fund. Just how much these fees amounted to I have no way of telling. No record has been kept of the fees prior to January 1, 1931. Sometimes the clerk collected them and at other times they were neglected. No money has been paid to me excepting commission for appraising estates on inheritance tax and this money was turned over to the county by me. I am still receiving \$287.50 per month.

The assessed valuation is about twenty-four million in Fort Bend County, and the population between twenty-five and thirty-seven thousand. I am finding no fault with the salary, but would like to know if the arrangement is legal."

In answer to your inquiry you are respectfully advised that the office of County Judge in your county is now under what we commonly term the Maximum Fee Bill. We notice from your letter that you state that the fees derived from the office of County Judge are being turned into the county fund. In our opinion this is not legal, and the County Judge should receive his compensation as provided by Articles 3883, 3891, and 3895, Revised Civil Statutes.

You state that the population of Fort Bend County is between twenty-five and thirty-seven thousand inhabitants. Taking that fact into consideration we wish to direct your attention to Section 2, Article 3883, as amended by the Acts of the Forty-first Legislature, Fourth Called Session (see chapter 20, page 39) which provides that the County Judge in counties containing as many as twenty-five thousand and less than thirty-seven thousand five hundred inhabitants *in which there is no city containing over twenty-five thousand inhabitants* may retain maximum annual fees in the amount of twenty-five hundred dollars. Of course, if there is a city containing over twenty-five thousand inhabitants, Section 3 of Article 3883 would apply instead of Section 2 of Article 3883, and in this connection, we wish to call your attention to Article 3891, as amended by the Acts of the Forty-first Legislature. Fourth Called Session, (see Chapter 20, page 33) which deals with the disposition of excess fees, and quoting that portion of said article as applicable hereto:

"Article 3891. Disposition of fees. Each officer named in this Chapter shall first out of the fees of his office, pay or be paid the amount allowed him under the provisions of this Chapter, together with the salaries of his assistants and deputies, and the amount necessary to cover costs of premium on whatever surety bond may be required by law. If the fees of such office collected in any year be more than the amount needed to pay the amount allowed such officer and his assistants and deputies, same shall be deemed excess fees, and in counties in which the population is less than thirty-seven thousand five hundred (37,500) inhabitants, such officer shall retain all such fees, in addition to the amount specified in Article 3883 and 3883-A, until same amounts to twelve hundred fifty (1250.00) dollars, and of the remaining excess fees, such officers shall retain one-fourth of such remaining excess fees, until such one-fourth amounts to seven hundred fifty (\$750.00) dollars; *provided, that in no case shall any officer in such counties receive as total compensation in excess of four thousand five hundred (\$4,500.00) dollars.*"

Thus, we see that the County Judge in the counties mentioned in

the class of Section 2, Article 3883 could earn as maximum fees twenty-five hundred (\$2500.00) Dollars, and then considering Article 3891 it would be possible for the County Judge to earn as much as four thousand five hundred (\$4,500.00) dollars.

Article 3895 R. C. S., authorizes the commissioners' court to pay a county judge ex-officio compensation for services performed, where there is no fee allowed, and limits the amount that may be allowed. Article 3926, R. C. S., enumerates some of the duties of the County Judge for which he receives no fees. And under Article 3895, the commissioners' court is authorized (it is within their discretion) to pay an ex-officio compensation to said official. It is noticeable that Article 3895 provides:

"* * * provided such compensation for ex-officio services allowed shall not increase the compensation of the official beyond the maximum of compensation and excess fees allowed to be retained by him under this chapter."

In the case of Anderson County vs. Hopkins, 187 S. W. 1019 the Court construed the statute composing Article 3895, and held the Commissioners' Court under the statute could allow an officer ex-officio compensation just so the amount allowed plus the compensation earned does not exceed the maximum fees plus excess fees allowed to be retained by an officer. In other words, if an officer is allowed \$2500.00, and allowed to retain \$2000.00 in excess fees, then it is possible to earn a total of \$4,500.00. If the fees and excess fees earned amount to Three Thousand (\$3000.00) Dollars, then the Commissioners' Court could allow Fifteen Hundred (\$1500.00) Dollars ex-officio compensation to said official.

It is our opinion, and you are so advised that the County Judge is not authorized to turn in to the county all fees derived from his office and receive a salary of \$287.50 for services performed but said official must be governed in accordance with the maximum fee bill.

Yours very truly,

EVERETT F. JOHNSON,
Assistant Attorney General.

Op. No. 2844.

FEES—SHERIFFS' AUTOMOBILE EXPENSES—DEPUTIES—CONSTABLES
AND JUSTICES OF THE PEACE.

1. The phrase, "fees of all kinds" embraces every kind of compensation allowed by law *unless* excepted by some provisions of the statute.
2. Article 3897, Revised Civil Statutes, allows officers under the "maximum fee bill" to retain all fees of their respective offices until the close of the fiscal year.
3. Sheriff not authorized to charge expenses for removing prisoners. Section 4 of Article 1030, Code of Criminal Procedure, provides mileage compensation to be allowed official.
4. The expenses of the maintenance and operation of automobiles purchased by the Commissioners' Court for the use of the sheriff shall be deducted by him from excess fees due by him to the county.
5. The sheriff may appoint a woman as a deputy sheriff.

6. County judge serving only three months of year can only receive one-fourth ($\frac{1}{4}$) of maximum annual compensation allowed for the entire year.

7. The "net profits" derived from the feeding of prisoners are to be accounted for by the sheriff in his annual report as other fees now provided by law.

8. Officials under the "maximum fee bill" are entitled to the fees due their respective offices when collected.

9. A sheriff may appoint as many deputies as the commissioners' court under Article 3902 may permit.

10. Constables and justices of the peace in counties containing a city of over twenty-five thousand inhabitants are allowed to retain maximum annual basic fees in the amount of Two Thousand Seven Hundred Fifty Dollars (\$2,750.00).

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, March 30, 1931.

Honorable Linton S. Savage, County Attorney, Corpus Christi, Texas.

DEAR SIR: The Honorable M. G. Eckhardt has delivered to us your letter of March 24th wherein you submit the following questions for our opinion:

1. "What is the meaning of 'fees of all kinds'?"

The Supreme Court in the case of Ellis County vs. Thompson, 95 Texas 29, said, in construing a provision of the statute containing the term "fees of all kinds":

"The phrase 'fees of all kinds' embraces every kind of compensation allowed by law to a clerk of the county court *unless* excepted by some provision of the statute."

In the case of Eastland County vs. Hazel, et al, 288 S. W. 518, the Court of Civil Appeals of El Paso defined the term as follows:

"The 'fees of all kinds' for public officers embrace every kind of compensation allowed by law *unless* excepted by some provision of the statute."

This term has received the same construction by the Court of Civil Appeals in the case of Navarro County vs. Howard, 129 S. W. 859.

With the support of the foregoing authorities, it can be safely said that no officer mentioned under the maximum fee bill is entitled to receive fees, or compensation, of any kind beyond the amount allowed by law unless it is some fee which is excepted by a provision of the statute; for instance, a reward received by the sheriff is specifically exempt by the statute and is not included within the term, "fees of all kinds."

2. "Are excess fees retained by the officers until close of fiscal year and then paid by the officer into the county treasury?"

Article 3897, as amended by the Acts of the Forty-first Legislature, Fourth Called Session, seems to fully answer this question:

"Each officer mentioned in Article 3883, 3883-a and 3886, shall, at the close of each fiscal year, make to the district court of the county in which he resides by filing with the district clerk, on forms designed and approved by the state auditor, a sworn statement in triplicate, one copy of which shall be forwarded to the state auditor by the district clerk within thirty

days after same has been filed in his office, and one copy of which shall be filed with the county auditor, if any; otherwise said copy shall be filed with the commissioners' court. Said report shall show the amount of fees collected by him during the fiscal year. . . ."

We are of the opinion that the officers are allowed to retain all fees of their respective offices until the close of the fiscal year. Article 3897 further provides that the report shall be filed not later than March first, and attaches a penalty for a failure to file such report within the time specified.

3. "In conveying defendants in felony cases to points out of county, can sheriff use his own individual automobile and charge expenses of trip, such as gasoline, oil and repairs to car, to expense account not to exceed maximum amount allowed by law for transporting defendants charged with felony?"

The sheriff would not be authorized to charge any expenses on a trip such as gasoline, oil, etc. Section 4 of Article 1030, Code of Criminal Procedure, provides for the compensation to be allowed the sheriff for removing a prisoner. Any expenses incurred, either in an automobile privately owned or in an automobile belonging to the county, would have to be paid out of the compensation allowed by statute for the removing of a prisoner.

4. "Are repairs to automobiles purchased by county for sheriff's office, when incurred through operation of automobiles in county for sheriff's business and duties of office, such expenses as are necessary expenses, deductible by sheriff from amount if any, due by him to county? Is gasoline and oil properly allowable as such expenses in the operation of the cars within the county?"

Article 3899 specifically answers this question and, as applicable hereto, reads as follows:

"The commissioners' court of the county of the sheriff's residence may, upon the written sworn application of the sheriff stating the necessity therefor, allow one or more automobiles to be used by the sheriff in the discharge of his official duties, which, if purchased, shall be bought by the county in the manner prescribed by law for the purchase of supplies and paid for out of the general fund, and they shall be and remain the property of the county. *The expenses of the maintenance and operation of such automobile, or automobiles, as may be allowed shall be paid for by the sheriff, and the amount thereof shall be reported by the sheriff on the report above provided for, and shall be deducted by him from the amount, if any, due him to the county, in the same manner as other expenses are deducted which are provided for in this law.*"

5. "Can the sheriff appoint a woman as an assistant, or deputy, to attend to the routine matters of office, such as keeping books, preparing returns and papers, etc.?"

The sheriff may appoint a woman as a deputy sheriff provided appointment is made according to Article 3902, Revised Civil Statutes.

6. "If 'A' is incumbent in county judge's office for three months and resigns and 'B' is thereupon appointed, what amount of maximum fees is 'A' entitled to and to what extent can he limit 'B' in the collection and retaining of fees?"

If "A" has served as county judge for three months in your

(Nueces) county and resigns, the maximum compensation he could receive for his services is One Thousand, Three Hundred and Seventy-five Dollars (\$1,375.00). The maximum amount allowed the county judge for a year in Nueces County is Five Thousand, Five Hundred Dollars (\$5,500.00), and we are of the opinion that a person serving only three months could only receive one-fourth ($\frac{1}{4}$) of that amount, "B," who is appointed when "A" resigns, could only receive such compensation as allowed by law for the remaining nine months of the year. "B's" maximum would be Four Thousand, One Hundred and Twenty-five Dollars (\$4,125.00). Both "A" and "B" should receive this compensation out of the fees of office.

7. "Are profits over and above expenses in caring for and feeding prisoners, and safe-keeping of same, properly considered fees of office under present amended law in respect of fees of various officers?"

The net profits derived from the allowances for the feeding of prisoners is clearly answered by referring to the statute. Article 1040, Code of Criminal Procedure, reads as follows:

"For the safe-keeping, support and maintenance of prisoners confined in jail or under guard, the sheriff shall be allowed the following charges:

"1. For the safe-keep of each prisoner for each day the sum of fifteen cents, not to exceed the sum of two hundred dollars per month.

"2. For support and maintenance, for each prisoner for each day such an amount as may be fixed by the commissioners' court, provided the same shall be reasonably sufficient for each purpose, and in no event shall it be less than forty cents per day nor more than seventy-five cents per day for each prisoner. *The net profits shall constitute fees of office and shall be accounted for by the sheriff in his annual report as other fees now provided by law.* The sheriff shall in such report furnish an itemized verified account of all expenditures made by him for feeding and maintenance of prisoners, accompanying such report with receipts and vouchers in support of such items of expenditure, and the difference between such expenditures and the amount allowed by the commissioners' court shall be deemed to constitute the net profits for which said officer shall account as fees of office."

The foregoing provisions of Section 2 of Article 1040 is clear in its terms stating that the net profits derived from the feeding of prisoners are to be accounted for by the sheriff in his annual report as other fees now provided by law. This Article, prior to its amendment in 1923, was old Article 1142, and the Court of Civil Appeals at Galveston in the case of Harris County vs. Hamlin, 203 S. W. 445, held that the amounts allowed the sheriff by the commissioners' court, within the limitations prescribed by statute for the safe-keeping, feeding and care of prisoners in the county jail, were not fees of office and were not accountable as such. However, this Article in its amended condition specifically states that such fees are accountable as fees of office. In the case of Binford vs. Harris County, 261 S. W. 535, the Court held that under the provisions of Section 2, Article 1040, Code of Criminal Procedure, the net profits derived were accountable as fees of office. The Court held that the amount received under Section 1, Article 1040, Code of Criminal Procedure, for the safe-keeping of the prisoners, was not accountable as fees of office.

8. "Are all fees of various officers paid to them each respectively when collected?"

As a general proposition, the officers under the maximum fee bill are entitled to the fees due their respective offices when collected, unless otherwise provided by statute. The tax collector, of course, will handle the fees of his office as prescribed by the provisions of the statute, but those officials who do not collect their fees direct, but through the county or district clerks, should receive the fees due their offices when collected by the proper officials.

9. "Is the sheriff under Article 6869 still limited to the appointment of three deputies, or is this provision not applicable to counties the size of Nueces County?"

There seems to be a conflict between the provisions of Article 6869 and Article 3902, Revised Civil Statutes, 1925, as far as the appointment of deputies by a sheriff is concerned. This Department has rendered an opinion which discusses at great length these two articles and, therefore, we are enclosing a copy of that opinion which, we believe, answers your question.

10. "What is the basic fee of constables and justices of the peace in Nueces County?"

In reference to the basic fees of constables and justices of the peace, your attention is directed to Article 3883-a, Revised Civil Statutes, 1925. The greater portion of Article 3883 has been repealed, but that portion of said article relating to constables and justices of the peace has not been repealed. The following portion of Article 3883-a is still in force and effect:

"In counties containing a city of over 25,000 inhabitants, or in such counties as shown by the United States census of 1910, shall contain as many as 37,000 inhabitants, the following amount of fees shall be allowed—justices of the peace an amount not exceeding \$2,750.00 per annum—constable an amount not exceeding the sum of \$2,750.00 per annum; provided, the compensation fixed herein for sheriffs, constables and their deputies, shall be exclusive of any rewards received for the apprehension of criminals or fugitives from justice."

This Department has construed this portion of the statute as tying the census of 1910 only to the county and that the population of the city is not tied to the 1910 census, but that phase is governed by Article 3889 which is still the law and which uses the words, "The preceding Federal census shall govern," etc.

Nueces County probably did not have a population of 37,000 in 1910 but Corpus Christi, a city within said county, has at this time, a population in excess of 25,000. Therefore, constables and justices of the peace in Nueces County are allowed to retain maximum annual fees in the amount of Two Thousand, Seven Hundred and Fifty Dollars (\$2,750.00). This is their basic fee, and, according to the provisions of Article 3891, it is possible for them to earn fees up to the amount of Five Thousand, Five Hundred Dollars (\$5,500.00).

Yours very truly,

EVERETT F. JOHNSON,
Assistant Attorney General.

Op. No. 2850.

LEGISLATURE—LENGTH OF TERM—COMPENSATION AND PER DIEM.

1. Under Article 3 of Section 5 of the Constitution, as amended, the Legislature may continue in regular session beyond the period of one hundred and twenty (120) days.

2. Under Sections 5 and 24 of Article 3 of the Constitution, as amended in November 1930, the "first one hundred and twenty (120) days of the session" means one hundred and twenty (120) continuous days not excepting Sundays, holidays or days in which the Legislature is not in session.

3. The Legislature having fixed the per diem of its members at ten dollars per day, members are entitled to such per diem for the full one hundred and twenty (120) days, even though absent, without excepting Sundays and holidays or days when the Legislature is temporarily adjourned.

4. In order to be entitled to per diem and mileage, a Legislator must have attended and been sworn in as such.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, May 8, 1931.

Hon. Thos. R. Bond, Chairman, Committee Municipal and Private Corporations, House of Representatives, Capitol.

DEAR SIR: We have for attention your letter dated May 2, 1931, addressed to the Attorney General, which is as follows:

"I would like to have a ruling from your department on the following questions that present themselves to my mind, as a correct solution materially affects proceedings of this Legislature and matters coming before the various committees, including the committee that I happen to be chairman of:

"(1) Section 5 of Article II of the State Constitution provides that during the following sixty days, (meaning the last sixty days) the Legislature shall act upon such bills; etc. then pending.

"I do not find any provision of the State Constitution as authorizes the Legislature to consider anything beyond the sixty day period, unless such right is granted under Section 24.

"I would like to have your construction of the Constitution as to whether or not this Legislature can consider any business beyond the sixty day period named in the Constitution and whether or not this Legislature would have the right to continue in session beyond the 120 days.

"(2) Article 24 provides that the members of the Legislature shall receive a per diem not exceeding \$10. per day for the first 120 days of each session, etc. It will be observed that the Constitution contemplates the compensation of the Legislature to be paid by the day, not by the week, month, or year. I would like to have the ruling from your department as to whether or not members of the Legislature are entitled to receive pay when not in actual attendance of the Legislature, and whether or not members are entitled to receive pay on Sundays or other days during adjournment from one day over to some succeeding day? It occurs to me that the members of the Legislature are employed by the day and they cannot receive pay when not performing or attempting to perform the service of which they have been employed, unless they are present and tendering their service and those who refuse to tender such service by reason of adjournment would not be entitled to receive compensation. I think that if the provisions of the Constitution were written into a contract between private individuals the court would hold that the employees would not be entitled to recover, only for the day or days he reported for service under such employment.

“(3) The Constitution provides for 120 days session. Now does the 120 days contemplate 120 days in actual session or shall the days in which the Legislature is not in session by reason of adjournment be taken into consideration in determining the 120 day session? I have been informed that the Attorney General of Oklahoma has held that Legislators can not receive pay except when they are on the job.”

1.

In reply to your inquiry No. 1:

This Department has already written and furnished to both Houses of the Legislature an opinion on the matter involved in said inquiry. In that opinion, we held that there is nothing in Section 5 of Article 3, as recently amended, which in terms or by necessary implication limits the legislative session to one hundred and twenty (120) days. Section 2 of said amendment, in providing a per diem not to exceed ten (\$10.00) dollars per day for members of the Legislature for the first one hundred and twenty (120) days of each session, and after that not exceeding five (\$5.00) dollars per day for the remainder of the session, seems very clearly to imply that the legislative session may continue longer than one hundred and twenty (120) days, otherwise, there could be no “remainder of the session” after the expiration of the first one hundred and twenty (120) days. A copy of the above opinion of this Department has already been furnished you. It is the opinion of the Department that the session may be extended indefinitely. (See Opinion No. 2847 dated May 4th, 1931, addressed to Hon. Fred H. Minor.)

2.

Your question No. 3 logically precedes, in our judgment, question No. 2; and the answer to the latter is, to some extent, controlled by the former.

By your third inquiry you desire an opinion as to whether the one hundred and twenty (120) days mentioned in the amended article of the Constitution means one hundred and twenty (120) continuous days regardless, or one hundred and twenty (120) days after excluding the days which the Legislature is not in session. It is the opinion of this department that the one hundred and twenty (120) days named means one hundred and twenty (120) consecutive days beginning on the day the Legislature convenes and ending on the one hundred and twentieth (120th) day thereafter.

Sundays are days usually devoted to rest and by many to religious services; in addition Sundays are legal holidays, and we think it not contemplated that the Legislature is under duty to hold sessions on those days. Public holidays are also days on which public officials are, or may be, excused from public service. Yet, in computing days which constitute a period of time of more than a week, those days are not excluded but are included in the computation unless expressly excluded by law. See 26 R. C. L., Section 26. We find that rule recognized in many of our legal matters. For example, the law requires that a citation be served ten days before court in order to require a defendant to answer. Where same are required to be published for three weeks or for four weeks, Sundays are included. Our Supreme Court has held, when a statute requires that an act shall be

done within a certain number of days, Sundays cannot be excluded although it should be the last day and the bill was filed on Monday. *Hanover Fire Insurance Company vs. Shrader and Rogers*, 89 Texas 35; quoting with approval *Burr vs. Lewis*, 6 Texas 76; in that opinion the Supreme Court quoted from 4 Pick. (Mass.) the following:

“When the time limit for a particular purpose by a statute may necessarily include one or more Sundays they are to be included in the enumeration.”

Article 3, Section 40 of the Constitution provides:

“No such (special) sessions shall be of a longer duration than thirty days.”

It would hardly be contended by anyone that the Legislature, by dilatory tactics or by taking temporary recesses or adjournment, could extend this time beyond thirty days from the date the Legislature was convened. Section 14, Article 4 of the Constitution in providing that every bill shall be presented to the Governor and that if it shall not be returned with his objections within ten days (Sundays excepted) it shall be a law in like manner as if he had signed it. The framers of that provision understood the general rule and hence specially excepted Sundays from the ten days allowed to the Governor.

The word “session,” as used in the constitutional amendment, evidently means the entire period of time from the beginning to the end of the time ensuing after the Legislature has convened and until it finally adjourns. It is not confined and does not mean, we think, merely the days when the Legislature is actually engaged in the passage of laws. In view of the fact that Sundays and holidays are not excepted, we conclude that they are included in the expression “the first one hundred and twenty (120) days of each session,” as used in the amendment.

It is, therefore, the opinion of this Department that the one hundred and twenty (120) days, named in Sections 5 and 24 of Article 3, as amended, of the Constitution, began on the day the present Legislature convened, and will expire on the one hundred and twentieth (120th) day from that date, counting the day the Legislature met.

3.

Your second inquiry may be stated, in substance, in the following language:

“Is a member of the Legislature entitled to receive his per diem on Sundays or on days when he does not attend the session of the Legislature or on days when the Legislature is in temporary adjournment for a few days?”

A member of the Legislature is elected, not for so many days but for two years, which may be considered as the term of his employment. The only difference between the provision of the Constitution before amendment and after amendment is shown in the two as quoted below.

Section 24 of Article 3, before amendment, in part reads as follows:

“The members of the Legislature shall receive from the public Treasury

such compensation for their services as may from time to time be provided by law not exceeding \$5.00 for the first sixty days of each session."

Said Section 24, as amended, reads as follows:

"The members of the Legislature shall receive from the public Treasury a per diem of not exceeding Ten (\$10.00) Dollars per day for the first One Hundred and Twenty (120) days of each session and after that not exceeding Five (\$5.00) Dollars per day for the remainder of the session".

It will be observed that there is quite a material difference between the old and the amended sections. The old provision recites that the members receive the per diem named as "compensation for their services," and also that such compensation be received as may "from time to time be provided by law, etc."; those provisions are both omitted from the new.

It will be observed further that no exceptions whatever are named in this section in fixing the per diem of members. It merely names in the first place those who are entitled to the per diem, to-wit: members of the Legislature; then, provides that a per diem not exceeding ten (\$10.00) dollars per day shall be received from the public Treasury for the first one hundred and twenty (120) days of each session, etc. It does not except Sundays or holidays or days in which the Legislature may be temporarily adjourned.

While Section 24 of Article 3, as amended and quoted above, does not expressly provide, as it did before amendment, for such compensation of members of the Legislature "as may from time to time be provided by law" (not exceeding stipulated amounts), yet it is clearly implied that the Legislature shall have the right to fix the compensation of its members, so long as the per diem does not exceed ten (\$10.00) dollars for the first one hundred and twenty (120) days of each session and five (\$5.00) dollars per day for the remainder of the session. Indeed an affirmative declaration or act on the part of the Legislature is necessary to determine the exact per diem to be received. Accordingly, the present Legislature at the beginning of this session passed House Concurrent Resolution No. 6, reading as follows:

"BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES OF THE STATE OF TEXAS, the Senate concurring, that the pay of the members of the Forty-second Legislature is hereby fixed at Ten (\$10.00) Dollars per diem for the first One Hundred and Twenty (120) days of the session and after that the sum of Five (\$5.00) Dollars per diem for the remainder of the session."

The foregoing Concurrent Resolution clearly fixes the per diem of the members at the maximum allowed under the constitutional amendment of ten (\$10.00) dollars per day for the first one hundred and twenty (120) days of the session and five (\$5.00) dollars per day thereafter, without reference to Sundays and holidays, or the absence of members from actual attendance upon each day of the session. This is vastly different from the provision made by the Legislature under this section of the Constitution before amendment. The law, as it existed at that time, was found in Article 6818, Revised Civil

Statutes, and fixed the compensation of the members of the Legislature in the following language:

"Members of the Legislature shall receive as compensation for their services and attendance upon any session of the Legislature. (underscoring mine) Five (\$5.00) Dollars per day for the first sixty (60) days of, each session and after that, the sum of Two (\$2.00) Dollars for the remainder of the session."

The distinction between Article 6818 and House Concurrent Resolution No. 6 is readily observed in that under the statute compensation is based upon "services and attendance," while under House Concurrent Resolution No. 6 attendance is not made a basis of compensation.

We believe the Legislature is as clearly authorized under the present amended section of the Constitution, to fix by law the compensation of its members, so long as the same does not exceed the sum of ten (\$10.00) dollars per day for the first one hundred and twenty (120) days of the session and five (\$5.00) dollars for the remainder, as it was under the Constitution before amendment which expressly authorized or required the Legislature to make provision for such compensation. In the case of *Ex Parte Pickett*, 24 Ala. Rep. 91, there was involved a provision of the Constitution of Alabama and the statutes of Alabama, the constitutional provision being that "each member of the General Assembly shall receive from the public treasury such compensation for his services as may be fixed by law." Under this provision of the Constitution, the statute provided that each member should be paid a specified sum for "each day's attendance," and there was a further provision that if any member was detained by sickness "after leaving home in coming to or is unable to attend the House, after he arrives at the seat of government, he is entitled to the same daily pay as an attending member." The General Assembly, by a joint resolution, adjourned on December 20th, 1853, to meet again on the 9th day of January, 1854, and the question involved in the case was as to whether the members who went home and returned were entitled to mileage and per diem. The decision turned on the meaning of the words "each day's attendance." The court, in disposing of it, used the following language:

"It could never have been intended that the members of the Legislature should receive pay for those days only on which they were actually engaged in the business of legislation; and neither the language employed, nor the purposes of the statute, would force such a construction upon us.

"A member may be engaged in attendance on the General Assembly, during periods of temporary cessation of legislative functions by the respective bodies; and the per diem compensation was intended as a remuneration for the services of the members, as well as to provide for their expenses during the period they were required to be absent from their homes in attending to the duties of legislation, as those duties are usually and ordinarily performed. And the object in limiting this compensation to each day's attendance, was, to secure on the part of the member, who was not within the exemptions provided for by section 44, the performance of legislative duty during those days which the house to which he belonged deemed necessary to devote to the business of legislation. It was never intended that the members of the Legislature should not receive pay for Sundays, or pending temporary adjournment upon holidays, or on occasions

of the death of a member. The practical construction of the law, from the organization of the government to the present time, has been otherwise, and we have no disposition to depart from it. These are not regarded as permanent cessations in the business of legislation, but in the nature of adjournment from day to day, when, in legal contemplation, the business is progressing. Indeed, it may often happen, that a temporary adjournment for a few days may tend to facilitate the business, since the committees may thus be afforded time to consider of and mature the matter of bills and resolutions referred to them. . . .”

You state in your letter that it is your understanding that the Attorney General of Oklahoma “has held that Legislators cannot receive pay except when they are on the job.” We have secured copies of recent opinions by the Attorney General of Oklahoma concerning the pay of Legislators, and have found that they do not even discuss the questions herein involved. For that reason it is not necessary to distinguish them at length. We have likewise carefully considered a previous opinion of this Department rendered on May 13th, 1929, and published as Opinion No. 2770 book 63, page 128, Reports and Opinions of the Attorney General of Texas for the years 1928 to 1930, page 300. This opinion holds:

“A member who is excused on account of personal business by a vote of two-thirds of the members present under Rule 26 (of the House) is not entitled to his per diem for the days for which he is excused”.

The above opinion was based, in part, upon the peculiar phraseology of the constitutional provision, Section 24 of Article 3 before amendment, and of Article 6818, Revised Civil Statutes, hereinbefore quoted. This article, as quoted above, expressly provided that members of the Legislature should receive “as compensation for their services *and attendance*” five (\$5.00) dollars per day, etc. A careful examination of the opinion of the Attorney General of May 13th, 1929, discloses that it was largely based upon this wording of the statute.

As amended, both the Constitution and the Concurrent Resolution of the Legislature fixing the per diem of members are different from the original; and the very words which are quoted in said opinion, as influencing the holding, have been omitted both from the constitutional amendment and from the act of the Legislature fixing the per diem of members. It is probable that if the former Attorney General had been construing these provisions in their present form, there would be no conflict between his opinion and this one.

You are, therefore, advised that by virtue of House Concurrent Resolution No. 6, a member of the Legislature is entitled to receive his per diem for the first one hundred and twenty (120) consecutive days of the session, irrespective of Sundays, holidays and temporary recesses.

4.

In rendering this opinion we are assuming that each member who shall claim per diem has attended and been sworn in as a Legislator. Without having taken the oath of office as a Legislator, one is not a member and cannot collect any per diem.

Yours very truly,

F. O. MCKINSEY,
Assistant Attorney General.

Op. No. 2855.

CONSTITUTIONAL LAW--LOCAL AND SPECIAL LAWS.

1. Chapter 98, Acts First Called Session, Forty-first Legislature, fixing salaries of county commissioners in counties having certain tax valuations according to the approved tax rolls of 1928 on file in the office of the State Comptroller, is a local or special law regulating the affairs of counties in violation of Article 3, Section 56, of the State Constitution, and, therefore, void.

2. Chapter 98, Acts First Called Session, Forty-first Legislature; Article 2350, Revised Civil Statutes, as amended by Chapter 46, Acts First Called Session, Fortieth Legislature; Article 3, Section 56, State Constitution. *Hall vs. Bell County* (Tex. Civ. App.) 138 S. W. 178; *Id.* 150 Tex. 558, 153 S. W. 121; *Altgolt vs. Gutzeil et al* 109 Tex. 123, 201 S. W. 400; *Commissioners' Court of Limestone County vs. Garrett* (Tex. Com. App.) 236 S. W. 970; opinion on rehearing, same case, (Tex. Com. App.) 238 S. W. 894; *Austin Bros. vs. Patton*, 288 S. W. 182; *Kitchens vs. Roberts* (Tex. Com. App.) 24 S. W. (2d) 464; *City of Fort Worth vs. Bobbitt, Attorney General*, 36 S. W. (2d) 470; *Clark vs. Finley*, 93 Tex. 171, 54 S. W. 343; *Womack, County Treasurer, et al vs. Carson et al* (Tex. Civ. App.) 38 S. W. (2d) 184.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, June 19, 1931.

Honorable J. A. Belger, County Auditor, Austin, Texas.

DEAR SIR: Your letter of recent date, addressed to the Attorney General was duly received and referred to the writer for attention. It reads:

"In view of the recent decision of the Supreme Court in the case of *City of Fort Worth vs. R. L. Bobbitt, Attorney General*; and at the request of the Commissioners' Court of Travis County, Texas, I desire to be advised as to the law with reference to amount of salary to be paid the county commissioners of Travis County.

"Article 2350, R. C. S. 1925, as amended by Acts 40th Legislature (1927), First Called Session, Page 138, provides for payment of annual salaries to county commissioners in all counties having assessed valuations above \$6,500,000.00; and it is therein provided that in counties having assessed valuations between \$30,000,000.00 and \$100,000,000.00 (which would include Travis County) the county commissioners shall each receive an annual salary of \$2400.00. "Assessed valuation" is defined as the total assessed valuation of all properties as shown by the tax rolls certified by the county assessor, approved by the commissioners' court and approved by the Comptroller for the previous year.

"House Bill No. 183, Acts 41st Legislature (1929) First Called Session, page 240, provides that in any county having a tax valuation of \$44,000,000.00 and less than \$47,000,000.00, according to the approved tax rolls of 1928 on file in the office of the State Comptroller, the annual compensation to be paid the county commissioners shall be \$3000.00.

"Travis County comes within the provisions of said House Bill No. 183. I enclose you herewith certificate of the State Comptroller stating which counties are shown by the 1928 rolls to come under the provisions of said Act.

"Under the facts stated, please advise me whether the county commissioners of Travis County should not be paid at the rate of \$2400.00 per annum, or at the rate of \$3000.00 per annum."

Article 2350, Revised Civil Statutes, as amended by Chapter 46,

First Called Session, Fortieth Legislature, is a general law fixing the compensation of county commissioners of this state according to the total "assessed valuation" of the respective counties. This article, as amended, reads as follows:

"In counties having the following assessed valuations respectively, the county commissioners of such counties shall each receive the annual salaries herein specified, to be paid in equal monthly installments out of the general funds of the county:

Assessed Valuation

\$ 6,500,000 and less than \$ 10,000,000	\$1,200.00
\$ 10,000,000 and less than \$ 12,500,000	\$1,500.00
\$ 12,500,000 and less than \$ 20,750,000	\$1,800.00
\$ 20,750,000 and less than \$ 25,000,000	\$2,000.00
\$ 25,000,000 and less than \$ 30,000,000	\$2,250.00
\$ 30,000,000 and less than \$100,000,000	\$2,400.00
\$100,000,000 and less than \$200,000,000	\$3,600.00
\$200,000,000 and over	\$4,200.00

"In counties having an assessed valuation of less than \$6,500,000 each county commissioner shall receive five dollars per day for each day served as commissioner and when acting as ex-officio road superintendent in his precinct, not to exceed one thousand dollars in any year. In counties whose assessed valuation is \$100,000,000 or more, said commissioners shall devote their entire time to the duties required of them by law and such other duties as their commissioners' court may require of them. 'Assessed valuation' means the total assessed valuation of all properties as shown by the tax rolls certified by the county assessor, approved by the Commissioners' Court and approved by the Comptroller for the previous year, provided that nothing herein shall affect any local or special law".

It will be noted that the term "assessed valuation" is defined in said article, as amended, as follows:

"'Assessed valuation' means the total assessed valuation of all properties as shown by the tax rolls certified by the county assessor, approved by the Commissioners' Court and approved by the Comptroller for the previous year".

At the First Called Session of the Forty-first Legislature another law was enacted, Chapter 98, fixing the compensation of the county commissioners in counties with certain tax valuation based on the approved tax rolls of 1928. The pertinent part of this Act reads:

"In any county having a tax valuation of Forty-Four Million (\$44,000,000.00) Dollars, and less than Forty-Seven Million (\$47,000,000.00) Dollars, according to the approved tax rolls of 1928 on file in the office of the State Comptroller, the annual compensation to be paid the County Commissioners shall be Three Thousand (\$3,000.00) Dollars".

You have very kindly furnished this department with a certificate of the Comptroller of Public Accounts which reveals the fact that this latter Act (Chapter 98) applies only to the counties of Grayson, Cameron and Travis, these being the only counties in the state which had "a tax valuation" for the year of 1928 of \$44,000,000.00 and less than \$47,000,000.00, according to the approved tax rolls of 1928 on file in the office of the State Comptroller.

You desire to know if the county commissioners of Travis County are to be paid the sum of \$2400.00 per annum, as provided for in Article 2350, as amended, or if they are to receive for their services

the compensation provided for by Chapter 98, which chapter fixes the compensation of county commissioners in all counties to which it applies at \$3,000.00 per annum. If Chapter 98 is constitutional, it necessarily follows that its provisions will control, insofar as they are in conflict with the former Act, Article 2350, as amended. Courts are always reluctant to declare a solemn Act of the Legislature invalid. The Attorney General, an executive officer, is likewise reluctant to express an opinion condemning an Act of the Legislature when he believes its provisions contravene the state's Constitution. However, it appears to have become the established policy of this department for the Attorney General to so express his opinion when the administration of the Act would or might create a personal liability on the part of the officers whose duty it is made to administer the same.

The statutes impose certain general duties upon county auditors with reference to county finances. Article 1645, et seq., Revised Civil Statutes. A county commissioner is required before entering upon the duties of his office to execute a bond in the sum of \$3,000.00, one of the conditions of which is "that he will not vote or give his consent to pay out county funds except for lawful purposes." Article 2340, Revised Civil Statutes.

We do not mean to say that if the Act under consideration is invalid, the county auditors of the respective counties affected by the Act who have permitted the commissioners in said counties to draw the increased salaries provided for therein, or that the respective commissioners who have collected the same are liable for the refund thereof. We premit any expression of opinion on that subject. We refer to the same only as a reason why we believe it our duty to pass upon the question of the validity of the Act involved.

It is provided in Section 56, Article 3, of our State Constitution, that:

"The Legislature shall not, except as otherwise provided in the Constitution, pass any local or special law, authorizing: . . . Regulating the affairs of counties, cities, towns, wards or school districts . . ."

It is not "otherwise provided" in the Constitution that the Legislature may pass a local or special law "regulating the affairs of counties." Therefore, the Legislature is prohibited by the above quoted provision from passing any local or special law regulating the affairs of counties, except as such regulation may be necessary or incident to some other law which the Legislature is authorized by the Constitution to pass. *Austin Bros. vs. Patton*, 288 S. W. 182.

Is the Act under consideration a "local or special law"? If it is, then does it "regulate the affairs of counties?" In the case of *Austin Bros. vs. Patton*, supra, it is said:

"Without entering at large upon the discussion of what is here meant by a 'local or special law', it is sufficient to say that a statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is special, and comes within the constitutional prohibition. *Clark v. Finley*, 93 Tex. 171, 54 S. W. 343. A local law is one the operation of which is confined to a fixed part of the territory of the state. *Id.* The statute under consideration relates to Houston County only—a particular one of the class, all counties being

the class. It is therefore a special law. The statute is one the operation of which is confined to that part of the territory of the state fixed and embraced in the confines of Houston County. Operating as it does in a fixed part of the territory of the state and its operation being confined to that fixed part of the territory of the state, is a local statute".

The Act, Chapter 98, under consideration, as heretofore stated, is one the operation of which is confined to that part of the territory of the state fixed and embraced in the confines of Grayson, Cameron and Travis Counties. It can never be operative in any other county. *City of Fort Worth vs. Bobbitt*, Attorney General, 36 S. W. (2d) 470. If the Act had named the counties of Grayson, Cameron and Travis and declared it applied to them only, it would have been no more specific in designating the counties to which it applies than it has done by its plain provision which makes the Act only applicable to those counties having certain tax valuation for the year 1928.

It is the opinion of this department, and you are so advised, that this Act is clearly a "local or special law" within the meaning of Section 56, Article 3, of our Constitution. *Hall vs. Bell County* (Tex. Civ. App.) 138 S. W. 178; *Id.*, 150 Tex. 558, 153 S. W. 121; *Altgelt vs. Gutzeit et al*, 109 Tex. 123, 201 S. W. 400; *Commissioners Court of Limestone County vs. Garrett* (Tex. Com. App.) 236 S. W. 970; opinion on rehearing, same case, (Tex. Com. App.) 238 S. W. 894; *Austin Bros. vs. Patton*, supra; *Kitchens vs. Roberts* (Tex. Civ. App.) 24 S. W. (2d) 464; *City of Fort Worth vs. Bobbitt*, Attorney General, supra; *Clark vs. Finley*, 93 Tex. 171, 54 S. W. 343; *Womack, County Treasurer, et al vs. Carson et al* (Tex. Civ. App.) 38 S. W. (2d) 184.

Under the general law, Article 2350, as amended, the salary of a county commissioner in each county of this state which had an "assessed valuation" for the preceding year of \$30,000,000.00 and less than \$100,000,000.00, is fixed at \$2400.00 per annum. The Counties of Grayson, Cameron and Travis evidently fall within this classification. The commissioners in said counties will receive the annual compensation provided for in said article, unless this special or local law, Chapter 98, controls. By this special or local law the salaries of said officers are fixed, until changed by the Legislature, at \$3,000.00 per annum. "Assessed valuation", as that term is defined in said Article 2350, as amended, in each of said three counties may change from year to year. It may fall below \$44,000,000.00 or it may increase beyond \$47,000,000.00 in any one or all of the counties of Grayson, Cameron and Travis, but the salaries of the commissioners in said counties fixed by this Act, if valid, would not fluctuate but remain the same. This, notwithstanding in any other county of the state whose "assessed valuation" is over \$30,000,000.00 and less than \$44,000,000.00, or is \$47,000,000.00 and less than \$100,000,000.00, the county commissioners in such a county cannot receive but \$2400.00 each per annum. Again, any county whose "assessed valuation" was either above or below the limitation fixed by the Act for the year 1928, but subsequently its "assessed valuation" increases or decreases so as to bring it within the limitation of said article, would not be affected thereby.

Salaries of county commissioners should be fixed by a general law.

Altgelt vs. Gutzeit et al, supra. The salaries of the county commissioners in the three counties affected by Chapter 98 are increased in the sum of \$600.00 per annum over those of the same class fixed by the general law. The result is the Act regulates the affairs of each of the three counties affected by it, and being a local or special law is, therefore, void. Altgelt vs. Gutzeit et al, supra, and authorities heretofore cited.

You are, therefore, advised that the salary of a county commissioner in Travis County, as well as in the other counties affected by Chapter 98, is governed and fixed by Article 2350, as amended, unless changed by some valid enactment of the Forty-second Legislature.

Yours very truly,

BRUCE W. BRYANT,
First Assistant Attorney General.

Op. No. 2858.

REGISTRATION FEES—REFUNDS—CREDIT MEMORANDUMS—PAYMENT.

1. The Legislature, by Section 3-A of Chapter 88, Acts of the Second Called Session of the Forty-first Legislature, appropriated the county portion of motor vehicle fees to the county road and bridge fund, but the Forty-second Legislature has the power to otherwise direct the expenditure of all or any part of said fund, as they have done in Senate Bill No. 38.

2. A credit memorandum, under the act first mentioned, may be issued to the owner of the vehicle at the time it is demolished or destroyed and such credit memorandum may be sold, assigned and transferred.

3. A credit memorandum issued under the provisions of this act may not be used on the registration of more than one vehicle, and such credit memorandum must be used during the year for which it is issued and not afterward.

4. The tax collector, upon receipt of a credit memorandum upon the registration of a motor vehicle, should obtain from the county clerk a warrant to be paid from the county road and bridge fund, and such credit, or so much thereof, as the proof may show was used in the registration of another vehicle for the current year, and should account to the county treasurer and to the State Highway Department for all registrations in cash, just as he now does and is required to do under other provisions of law.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, June 9, 1931..

State Highway Department, Austin, Texas.

Attention: Mr. C. H. Lloyd.

GENTLEMEN: This will acknowledge yours of June 5, in which you ask some five questions relating to Senate Bill No. 38, passed by the Forty-second Legislature, which is a bill amending Section 3-A, Chapter 38, Acts of the Second Called Session of the Forty-first Legislature, by adding Section 3-B and Section C-1, providing for the refunding of license fees on motor vehicles which are demolished or destroyed.

In order that the provisions of this amendment may be before us, we quote the act as follows:

"AN ACT

amending Section 3-A, Chapter 88, Acts of the Second Called Session of the 41st Legislature, by adding thereto Section 3-B and Section C-1; providing for the refunding of license fees paid on motor vehicles which are subsequently demolished or destroyed; prescribing the fee therefor, and the means and manner of making such refund; and declaring an emergency.

"Be it enacted by the Legislature of the State of Texas

"Section 1. That Section 3-A, Chapter 88, Acts of the Second Called Session of the 41st Legislature be, and the same hereby is amended by adding thereto the following Section to be known as Section 3-B.

"Section 3-B. (A) If any motor vehicle be registered in Texas for any current year, and license fee paid thereon for such year, and such vehicle shall be destroyed and demolished to such an extent that the same cannot thereafter be used upon the highways of this State, the owner thereof may take the license fee receipt, together with the license plates for such vehicle, to the Tax Collector or such officer issuing the same, and said officer shall, upon satisfactory proof being given of such destruction and demolition, refund the fee paid thereon representing the full months during which said vehicle will not be used, but no refund shall be made for the fractional part of any month.

"(B) In the event such receipt or plates have been lost or destroyed, then proof shall be made thereof upon such forms and in such manner as the State Highway Department may prescribe, and if either of said plates have been destroyed, the Highway Department shall have the right to require its approval of any such refund. The form of such application shall be prescribed by such Department, and shall be accompanied by a fee of twenty-five cents, which fee shall be retained by such officer; which shall be accounted for as fees of office. Such collector shall retain the restored receipts and plates or send same to the said Department, or dispose of same as said Department may prescribe.

"(C) No refund provided for herein shall be made in cash, but a credit memorandum on a form to be prescribed by the Highway Department shall be issued for the amount of such refund, which shall be accepted by the Tax Collector for the face value thereof, by such persons or his assignee on the registration of another vehicle for the current year, for which the destroyed or demolished vehicle was registered, but not otherwise. Such credit shall be allowed out of the county's part of said funds and not the State's.

Sec. 2 The fact that many motor vehicles which are registered for an entire year are destroyed or demolished before the expiration of such year, operates unfairly and unjustly, and imposes a license fee upon a privilege which is not enjoyed, creates an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended, and said Rule is hereby suspended, and this Act shall take effect and be in force from and after its passage, and it is so enacted."

We will take up your questions in order in which they occur and answer each question in its order.

Question No. 1:

"The credit memorandum provided for in this Act provides that when it is presented the amount must come out of the County's share of license fees. This presents a problem confronted by a number of counties which have received a total of \$175,000.00 net, and will not receive any additional license fees for the remainder of this calendar year. How can the credit memorandum be applied against the County portion of license fee collections when there will be no more County funds to be derived from license fee collections for the balance of the year, without issuing a check from the County Road and Bridge Fund, which would violate Section 10 of House

Bill No. 6, Chapter 88, Page 172, General Laws of the Second Called Session, Forty-first Legislature?"

Answer: Under the provisions of this statute, the tax collector is required to accept the credit memorandum for its face value on the registration of another vehicle for the current year, and under this requirement, the tax collector should accept the credit memorandum, and as soon as he has done so, he should secure from the county clerk a warrant drawn upon the county treasury to cover the amount of the credit memorandum, or so much thereof as by a proper proof the tax assessor may show has been required to be used upon the registration of another vehicle, and under this law, it seems apparent that the approval by the Commissioners' Court, if it is required, would be nothing more than a matter of form, as would the approval of the county auditor in counties where there are auditors.

In any event, it seems that it would not be proper for the tax collector to simply deduct the amount of these credit memoranda which might be due to the county road and bridge fund but in each instance the credit memorandum should be presented to the county clerk for the issuance of a warrant, so that the tax collector will at all times be accounting both to the county and to the State Highway Department for monies actually received for registration, and at no time for credit memoranda.

Under this law the county auditor would be authorized and required to approve the issuance of a warrant by the county clerk for these refunds or for the amounts of the credit memoranda, or so much thereof as are applied to the registration of another motor vehicle by the county clerk.

In the latter part of this question you ask how these funds can be paid by the county to the holders of these credit memoranda through the county tax collector by his acceptance of these memoranda on the registration of another vehicle for the current year without violating Section 10 of House Bill No. 6, Chapter 88, page 172.

It is true that Section 10 of Chapter 88, General Laws of the Second Called Session of the Forty-first Legislature, just referred to, specifically appropriates and provides for the expenditure of this fund by placing it in the county road and bridge fund, but you are advised that the Legislature has the disposition of this fund and did have this disposition when it enacted House Bill No. 6, Chapter 88, and that it still has the disposition of that fund and that it may provide for its expenditure otherwise at any time. In other words, the same power which provided for the expenditure of this fund through the county road and bridge fund may also take away the purpose and manner of its expenditure and provide another or different purpose and manner of expenditure.

Question No. 2:

"Must the credit memorandum be issued only to the individual who paid the license fees to the Tax Collector, or can it be issued to anyone who has subsequently purchased the vehicle?"

Answer: The credit memorandum may be issued to the "owner" of the vehicle at the time that it is demolished or destroyed. You

will especially notice that the statute does not require this credit memorandum to be issued to the individual who paid the license fee, but in Section A does especially provide that it be issued "to the owner thereof."

Question No. 3:

"Can the credit memorandum be sold, or transferred for any consideration whatever, to other individuals than to whom it was issued?"

Answer: The statute provides in Section C "by such person or his assignee." Undoubtedly, under the provisions of the statute as it is now written, these credit memoranda may be assigned.

Question No. 4:

"Assume a credit memorandum in the amount of \$12.00 which is presented to the Tax Collector, where the registration fee for the remainder of the year is only \$6.00: Must the Tax Collector accept the credit memorandum, cancelling same, and issue the license plates *and* an additional credit memorandum for \$6.00?"

Answer: If a credit memorandum for more than the registration fee for the remainder of the year is presented to a tax collector on the registration of another vehicle, the credit memorandum would be required to be accepted, but it should be cancelled and no additional credit memorandum should be issued. The credit memorandum could not be applied in parts to the registration of more than one vehicle, nor could it be used in any other year than the year in which it was issued. You will notice that the statute says:

"by such person or his assignee on the registration of *another vehicle for the current year.*"

The wording of this statute clearly implies that the credit memorandum is not to be used as a credit on the registration of but one vehicle, and it is equally clear that the credit memorandum could not be used as a credit toward the registration of a vehicle except for the new year in which it was issued. When the credit memorandum has once been applied to the registration of a vehicle, whether the registration fee is less than the amount of the credit memorandum or not, the credit memorandum should be taken up and cancelled, and so much of the credit memorandum as was used for the registration should be paid to the tax collector by the county upon the proper proof being made to the county auditor or county treasurer.

Question No. 5:

"What is the status of the credit memorandum if accepted by the Tax Collector to apply as payment or part payment as a registration fee on a vehicle? By this is meant, must the Tax Collector consider the credit memorandum as a receipt to be accounted for and secure money from the County Treasurer out of the County Road and Bridge Fund and release the memorandum immediately; or must he consider the credit memorandum as cash and remit same, with any difference, to the County Treasurer after compiling his weekly report?"

Answer: This question has been answered in part, if not in full, in answering question No. 1. The tax collector should in each instance obtain from the county treasurer a warrant to be paid from the county

road and bridge fund for each credit memorandum accepted by him to the payment of a registration fee, or so much thereof as was used in registering another vehicle.

Yours very truly,

T. S. CHRISTOPHER,
Assistant Attorney General.

Op. No. 2862.

SHERIFFS—FEES OF OFFICE—REQUISITION.

Where a sheriff, armed with a *capias*, goes to another State after, and returns with, a person charged by indictment in this State with a felony, and the defendant waives the issuance of a resolution, he may be paid the mileage fees provided for in Articles 1029 and 1030, C. C. P., from the County Seat of the County where the indictment is pending to the State line and return.

Where a sheriff is commissioned by the Governor to go to another State after a person charged with an offense in this State, he may receive such compensation only as the Governor may allow him out of the appropriation made to the Executive Department for "Payment of rewards and other expenses necessary for the enforcement of the law."

In the first instance, the sheriff travels to and from the State line as a sheriff. In the second instance, he travels not as a sheriff but as an agent of the governor.

Articles 1005, 1006, 1029 and 1030, C. C. P.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, July 12, 1931.

*Hon. George H. Sheppard, State Comptroller of Public Accounts,
Capitol Building, Austin, Texas.*

DEAR SIRS Your letter of the 19th instant, addressed to Attorney General Allred, has been received and referred to the writer for attention. Your letter reads:

"Article 1005, Code of Criminal Procedure provides the manner for the returning of a fugitive from justice to this State.

"Article 1006 authorizes payment to persons rendering services in connection with returning fugitives from justice.

"There has been a long standing departmental construction allowing fees to sheriffs when returning fugitives from justice upon requisition from the Governor. Said construction was that the sheriffs were entitled to fees to the State line and return, under Article 1029 and Article 1030 of the Code of Criminal Procedure.

"In the light of the Statute and past custom followed by Comptrollers, I would be pleased to have your advice on the following questions.

"Do I have the authority as State Comptroller of this State to pay any one out of monies appropriated for traveling expenses for sheriffs of this State, when traveling under authority of Article 1005 and requisition of the Governor? If I do not have the authority, please advise what officer of this State, if any, does have the authority to pay and what should be the compensation.

"In view of the numerous accounts being filed in this office, and the importance of this question relative to law enforcement of this State, an early reply is respectively requested."

The questions submitted are, in our opinion, answered by the plain provisions of the statutes. Articles 1029 and 1030, Code of Criminal Procedure, fix the amount of fees which a sheriff is entitled to receive for executing each warrant of arrest or *capias* and includes a fee for mileage in going to the place of arrest, and mileage for himself and prisoner for conveying the prisoner to jail.

There is no need here to discuss the difference between the fees allowed in Article 1029 and 1030. What we shall say herein applies to a sheriff whether he is paid under one article or the other.

It is elementary that a sheriff of this State has no authority to make an arrest beyond the borders of this State. His authority in this respect ceases when he crosses the State line.

Articles 1005 and 1006, Code of Criminal Procedure, deal directly with the subject of returning a fugitive from justice from another State to this State, and his compensation therefor. These articles read respectively as follows:

"When the Governor deems it proper to demand a person who has committed an offense in this State and has fled to another State or territory, he may commission any suitable person to take such requisition. The accused, if brought back to the State, shall be delivered up to the Sheriff of the county in which it is alleged he has committed the offense."

"The officer or person so commissioned shall receive such compensation only as the Governor shall allow for such service, to be paid out of the State treasury upon a certificate of the Governor reciting the service rendered and the allowance therefor."

These two articles make it clear that when the Governor commissions a sheriff to go to another State and return a fugitive from justice, under a request made by the Governor upon the Governor of a sister State, the sheriff proceeds to carry out his commission, not as a sheriff but as agent of the Governor. The amount of compensation to be paid to the sheriff, as the agent of the Governor, is to be determined by the Governor and what ever amount of compensation allowed by him is all the compensation the sheriff can receive for services rendered as such agent.

It will be noted that Article 1006 specifically provides that the officer or person so commissioned *shall receive such compensation only as the Governor shall allow for such services*, to be paid out of the State Treasury upon a certificate of the Governor reciting the service rendered and the allowance therefor.

These articles, 1005 and 1006, specifically and exclusively fix the amount of compensation which a sheriff, or other officer, or person may receive from the State in executing a commission issued by the Governor under requisition. For many years the Legislature has been making an appropriation to the Executive Department for "payment of rewards and other expenses necessary for the enforcement of the law * * *."

It is our opinion that all allowances made by the Governor to a sheriff, other officer, or any person commissioned by him as his agent to go to another State and return therefrom a fugitive from justice in this State, must be paid out of this appropriation "upon a certificate issued by the Governor reciting the service rendered and the al-

lowance therefor." When the Governor has issued such a certificate and the same has been presented to the Comptroller, he is then authorized to issue a treasury warrant for the amount stated in said certificate and charge the same to the appropriation heretofore mentioned.

Having reached the above conclusion, it necessarily follows that you would have no authority to pay such an agent of the Governor out of the appropriation made to your department for the purpose of paying "Fees and costs of sheriffs, Attorneys and Clerks in felony cases."

We note that you say, "It has been a long standing departmental construction to allow fees to sheriffs when returning fugitives from justice upon requisition from the Governor." Said construction is that the sheriffs are entitled to mileage fees to the State line and return, under Article 1029 or Article 1030 of the Code of Criminal Procedure.

It is our opinion that this construction of the law is clearly erroneous. However, it is further our opinion that where an indictment has been returned against a person charged with a felony, a capias has been issued for his arrest, and he is located in another State, and signs a waiver of issuance of requisition and expresses his willingness to return to this State with an officer sent for that purpose, and the sheriff or other officer goes after said prisoner and returns the fugitive to the county where the indictment is pending, he may be compensated for said service as provided in Articles 1029 or 1030 of the Code of Criminal Procedure. The mileage such an officer would be entitled to receive would not extend beyond the State line. In this instance, the sheriff who goes after a prisoner in another State, travels as a sheriff until he reaches the State line and from the State line home. He is therefore entitled to the pay for such services as heretofore stated. This, I believe, to be a fair interpretation of the intent of the Legislature as expressed in said Articles 1029 and 1030.

To state our conception of the law a little more clearly, when a sheriff goes to another State after a prisoner, acting under a requisition issued by the Governor, he is acting not as a sheriff but as an agent of the Governor and his compensation is fixed by Article 1006 of the Code of Criminal Procedure. When he goes to another State with a capias, based upon an indictment charging the prisoner with a felony, he travels to the State line in going to the place of arrest and from the State line back to his county as a sheriff and his compensation is fixed by Articles 1029 and 1030 of the Code of Criminal Procedure, as the facts may be.

In this connection, we suggest that when you next prepare a form for sheriffs' accounts, you do so prepare it that when claims of this character are presented to you, the account will show upon its face whether the sheriff was acting as the agent of the Governor or whether he was acting as sheriff.

Yours very truly,

BRUCE W. BRYANT,
First Assistant Attorney General.

Op. No. 2863

CONSTRUCTION HOUSE BILL 336—COUNTY JUDGES AS AGENTS
OVERSIZE EQUIPMENT—CHAUFFEURS' LICENSES

1. Under provisions of House Bill 336, Acts of the Forty-second Legislature, Regular Session, county judges are specially designated agents of the State Highway Commission to issue permits for movement of super-heavy or oversize equipment.

2. House Bill 336, Acts of the Forty-second Legislature, Regular Session, is an amendment to Chapter 42, General Laws of the Forty-first Legislature, Second Called Session, and there is nothing in said House Bill 336 repugnant to or which repeals the provisions of Chapter 41, General Laws, Second Called Session of the Forty-first Legislature, which requires the giving of a bond and the payment of a fee of \$5.00 in order to secure permit for the movement of super-heavy or over-size equipment.

3. Any load projecting more than three feet in front or more than four feet in the rear of any vehicle, or chain of vehicles, may not be transported over the highways except under special permit provided for in Section 2 of the Act.

4. All persons operating commercial motor vehicles, as that term is defined in the statute, and as construed herein, with a carrying capacity of over one ton must have a chauffeur's license and the provision for a driver's license, contained in House Bill 335, Acts of the Forty-second Legislature, Regular Session, is in addition to or an additional requirement herein for a chauffeur's license.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, July 16, 1931.

Texas State Highway Department, Austin, Texas.

Attention: Mr. L. G. Phares

GENTLEMEN: This will acknowledge yours of the 6th, inst. in which you ask a number of questions relating to House Bill 336, passed at the regular session of the Forty-second Legislature. These questions will be considered in the order in which they occur in your letter.

Your first question relates to Section 2 of the Act, and is as follows:

1. "When such permits are issued by county judges, or other designated agents, should they be issued on a form prescribed by this department?"

You are advised that, under the provisions of the Act, the county judge, when acting on the issuance of permit for the movement of oversize or super-heavy equipment, is acting as the agent of the Highway Commission by special designation of the Act, and that permits issued by any county judge should be on forms prescribed by the Highway Department.

2. "Does any portion of House Bill No. 336 repeal Sections three and four of Senate Bill No. 10, Chapter 41, General Laws, Second Called Session, 41st Legislature, which requires a bond in an amount to be set and approved by the department for any damages that might be sustained to the highway by virtue of the operation of the equipment and the payment of a fee of \$5.00 which will accompany such bond?"

House Bill No. 336, Acts of the Regular Session of the Forty-second Legislature, is an amendment to Chapter 42, General Laws, Second Called Session of the Forty-first Legislature.

By the provisions of Section 3, Chapter 41, General Laws of the Second Called Session of the Forty-first Legislature, before a permit for the movement of super-heavy or oversize equipment is issued, the applicant is required to give a bond payable to the State Highway Department and conditioned that the applicant will pay to the State Highway Department any damages that might be sustained to the highways by virtue of the operation of the equipment, and such bond and application is required to be accompanied by a fee of \$5.00. There is nothing in the provisions of House Bill 336, Acts of the Forty-second Legislature, which would repeal or conflict with Section 3, Chapter 41, and this requirement is still in full force and effect and all applications for permits to move super-heavy or oversize equipment must be accompanied by such bond and fee.

Your third and fourth questions relate to Section 3 of the Act, and follow:

3. "Suppose Mr. "A" has a water well drilling outfit attached to a motor vehicle that exceeds ninety-six inches in width. Should this vehicle be required to pay a registration fee on its gross weight before being exempt under this Section?"

The provisions of House Bill No. 6, Chapter 88, page 172, General Laws, Second Called Session of the Forty-first Legislature provide that:

"Every owner of a motor vehicle, trailer or semi-trailer used or to be used upon the public highways of this state, and each chauffeur, shall apply each year to the State Highway Department, through the County Tax Collector of the county in which he resides for the registration of each such vehicle **."

Under the provisions of that portion of the old law just quoted, the owner of a well drilling outfit attached to a motor vehicle would be required to pay a registration fee upon its gross weight.

The provisions of House Bill 336, Acts of the Regular Session of the Forty-second Legislature, simply except from its provisions the limitation as to size; that is, as to length, width and height of a water well drilling machine.

4. "Section 3d provides that no train or combination of vehicles or vehicle operated alone shall carry any load extending more than three feet beyond the front thereof, nor except as hereinbefore provided more than four feet beyond the rear thereof. Does this mean that no vehicle or combination of vehicles shall carry any load which projects more than three feet beyond the front nor more than four feet beyond the rear thereof unless operating under a permit as provided for in Section 2 of this bill?"

You will notice that the statute uses the language "*except as hereinbefore provided*" and it seems from the use of these words that no combination of vehicles, or vehicle, operated alone could be operated upon the public highways of this State with a load which extends more than three feet beyond the front or more than four feet beyond the rear, unless it had previously obtained a permit for the movement of super-heavy or oversize equipment under the provisions of Section 2 of this act.

5. "Please explain Section 5b of this bill."

This question is too general in its nature to permit of an explicit answer

The effect of Section 5b, however, seems to be that the limitations as to length, weight and height of the vehicle and of the load do not apply to vehicles in the movement of property from the point of origin to the nearest common carrier shipping point or from the nearest common carrier shipping point to the point of destination; provided, however, that should the length of any such vehicle exceed 55-feet or the weight exceed 14,000 pounds, such movement would require a special permit under the provisions of Section 2 of the act.

Upon the submission of more specific questions, we would be glad to consider this section further.

6. "Should all persons operating motor vehicles exceeding one ton carrying capacity, and all those operating a commercial motor vehicle for compensation or hire regardless of its carrying capacity, be required to obtain a chauffeur's license?"

The provisions of this bill, Section 10, will require all persons operating a commercial motor vehicle, as defined in the act, with a carrying capacity of over one ton, to have a chauffeur's license. All commercial motor vehicles operated for hire, regardless of carrying capacity are not required, under the provisions of this act, to have a chauffeur's license, but they are required to have a driver's license, under the provisions of House Bill 355.

You are advised that the requirement of House Bill 336 for a chauffeur's license is in addition to the requirement of House Bill 335, which requires all operators of vehicles, subject to the regulation of the Railroad Commission, to have a driver's license. The requirement of Section 4b of House Bill 335 is for a special driver's license, which will be issued by the Railroad Commission to operators of regulated motor vehicles operating for hire, which is a special requirement in addition to the one for a chauffeur's license under Article 6687 of the Revised Civil Statutes referred to, which is made in House Bill 336.

Yours truly,
T. S. CHRISTOPHER,
Assistant Attorney General.

Op. No. 2864

WARRANTS—VALIDITY—COMMISSIONERS' COURTS—PUBLIC ROADS

1. Warrants issued by county commissioners' courts, within the limits prescribed by law, are not valid unless the constitutional requirement, Article 11, Section 7, is complied with and a tax authorized at the time to pay the interest and create a sinking fund for payment of the principal at maturity.

2. A county commissioners' court may issue time warrants in payment of debts created in the establishment of county public roads within the limits and the manner prescribed by Chapter 163, page 269, Acts of the Regular Session of the Forty-second Legislature.

3. All, or any portion, of the constitutional tax of 15c may be used and appropriated to pay the principal and interest of time warrants issued

in payments of debts legally created by the commissioners' court, but the special tax of 15c authorized by the Legislature may not be so used.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, July 28, 1931.

Mr. R. E. Lee, County Attorney, Mason, Texas.

DEAR SIR: This will acknowledge yours of the 25th addressed to Attorney General Allred.

You have set forth the material facts relating to the questions submitted, and we quote from your letter as follows:

"Our County Commissioners have been making an attempt to change the Menard-Mason public road so as to get it on a better and straighter road bed, with a view of inducing the Highway Department to take over said road and designate it as a highway. This road is largely in commissioners' precinct No. 3, and said precinct after having its available funds exhausted on said project, through the commissioners' court has issued warrants amounting to some \$6,000.00, payable to various of our citizens in 1, 2, 3, 4 and 5 years out of the Special Road & Bridge Fund (that is the 15c tax which was voted on by the citizens several years ago) and charged to said precinct No. 3. These warrants were merely written on the ordinary county warrant or script form, bear interest from date, etc. They now need some more money to complete the project as well as secure some right-of-way and have asked my opinion on issuing additional warrants like those mentioned above. On the 15th day of June 1931, said court noted on their minutes that the various precincts had asked for or made application to be permitted to borrow certain amounts of money which application was granted by the court and authority given.

"At no time when borrowing said money or on June 15th, when applying for authority to borrow additional money, was there any provision made for the levying and collecting of any tax to create a fund for retiring said warrants, said court having in mind that said warrants are to be paid out of the current revenues of the county in future years. I have advised said court that the warrants as already issued and as contemplated are invalid and they have asked me to secure an opinion from you on this matter, hence this letter."

Your letter seems to present two propositions, as follows:

1. Are the warrants totaling the sum of \$6,000.00, heretofore issued, valid warrants?
2. May the county commissioners' court establish and construct the Menard-Mason public road along another and upon a better and straighter road bed and pay for the cost of such construction by the issuance of the county's time warrants?

Referring to the first proposition, as to the legality of the \$6,000.00 warrants which have already been issued, we note from your letter that this sum is payable to various of your citizens in 1, 2, 3, 4 and 5 years out of the special road and bridge fund; that is, that this amount is payable out of the 15c special tax authorized by a vote of the people of Mason County several years ago. As bearing upon this proposition, we refer to Section 7, Article 11, Constitution of Texas, a part of which reads as follows:

"But no debt for any purpose shall ever be incurred in any manner by any city or county unless provision is made at the time of creating the same for levying and collecting a sufficient tax to pay the interest thereon

and providing at least 2% as a sinking fund, and the condemnation of the right-of-way for the erection of such work shall be fully provided for."

It is further especially noted from your statement of facts that at no time when issuing the warrants was there any provision made for levying and collecting a tax to create a fund for retiring said warrants. In other words, there seems to have been no provision made at the time of the issuance of the warrants to create the fund required by the Constitution, either to pay the interest or to provide a sinking fund.

In considering this matter it would seem to be necessary to determine, in the first place, whether or not the commissioners' court has the authority to thus construct a road under the constitutional provisions conferring certain powers upon commissioners' courts.

The Constitution provides in Article 11, Section 2, for:

"The establishment of county poorhouses and farms and the laying out, construction and repairing of county roads shall be provided for by general laws."

This section of the Constitution has been carried into effect by the provisions of Article 2351, Revised Civil Statutes of 1925, authorizing the commissioners' courts, by sections 3 and 4 of said article, to

"Lay out and establish, change and discontinue public roads and highways, build bridges and keep them in repair."

By section 6 of said article, the commissioners' courts are to:

"Exercise general control over all roads, highways, ferries and bridges in their counties."

Article 16, Section 24, directs that the Legislature shall make provisions for the working of public roads, for the building of bridges and for utilizing fines, forfeitures and convict labor for these purposes.

Article 8, Section 9, authorizes a tax not to exceed 15c for roads and bridges, and by amendment to this section it was provided that the Legislature may authorize an additional tax, not including the 15c, for the further maintenance of public roads.

From this letter it appears that the county commissioners seek to refund the \$6,000.00 warrants already issued out of the special 15c tax, because in your letter you refer to it as the special road and bridge fund and say that this tax was authorized by vote of the people several years ago. The warrants, when legally issued, may not be refunded out of the special road tax of 15c, as that is a tax which may be voted off by the people at any time, but, time warrants, which are legally issued, may be refunded out of the constitutional tax of 15c, authorized, inasmuch as it has been held in the case of *Dodenheim vs. Lightfoot*, 103 Texas 638, 132 S. W. 468, that the constitutional tax for roads and bridges is not a current tax for maintenance purposes and may, therefore, be used to be applied to the principal and interest of a debt.

The question here properly arises as to the authority of the county commissioners to lay out this new road along a new location and upon

a new road bed and to thus establish such road and create a debt which may be funded by the issuance of time warrants.

This power seems to have been clearly granted under the Constitution and by the subsequent enactment of Article 2351, Revised Civil Statutes of 1925 above referred to, and this authority is confirmed by the courts in the case of Macdonnell vs. Railway, 60 Texas 590. In this case it was contended that no power was given to "build" roads, on the one hand, and contended by the appellees, on the other, that it would be wrong to thus restrict the meaning of the word "establish", and the Court said that:

"We think it is clear that the word 'establish' should be construed to mean 'make' 'create' or 'found' permanently."

From this holding, undoubtedly, your commissioners' court has the right to establish and construct the road which it is establishing and constructing. It is also interesting to note in this connection that the word "debt" as used in the statutes relating to the issuance of time warrants, has been judicially construed in the case of McNeill vs. City of Waco, 32 S. W. 322 (Supreme Court of Texas) as follows:

"We conclude that the word "debt", as used in the constitutional provisions above quoted, means any pecuniary obligation imposed by contract, except such as were, at the date of the contract, within the lawful and reasonable contemplation of the parties, to be satisfied out of the current revenue of the year, or out of some fund then within the immediate control of the corporation."

The authority, therefore, being clearly in favor of the power of the commissioners' court to establish the Menard-Mason public road and to create a debt in that connection which might properly be refunded through the issuance of time warrants, the only question is, whether or not the commissioners' court of Mason County, took the necessary steps to make the warrants issued legally valid, binding obligations of Mason County.

The Article of the Constitution already cited requires that no debt shall be incurred unless

"provision is made at the time of creating the same."

for the levying and collecting of a sufficient tax. From your statement of facts, it is apparent that your commissioners' court did not make provisions for levying and collecting a sufficient tax to create a fund to pay the interest and principal of these warrants as they mature. It is true that you have the constitutional tax of 15c, which might have been used for that purpose, Dodenheim vs. Lightfoot, supra, but provision was not made by the commissioners' court to use any part of that constitutional tax for the retirement of these warrants or to pay the interest thereon.

From your letter there was merely an intention that these warrants would be paid out of the special road and bridge fund, and you especially mentioned the special tax of 15c authorized by the Legislature, but which special tax may not be used for this purpose.

In this connection we cite the case of Lassiter vs. Lopez, 202 S. W. 1039 (Civil Appeals), 217 S. W. 373 (Supreme Court); J. I. Case

Threshing Machine Co. vs. Camp County, 218 S. W. 1; Stratton vs. Commissioners' Court, 137 S. W. 170 (Writ of Error refused); and also opinion No. 2419 of the Opinions of the Attorney General of Texas, dated March 30, 1922.

Our conclusion is, therefore, that the warrants heretofore issued are not legally valid, binding warrants. We further conclude that the commissioners' court does have the authority to lay out and establish this road and to issue time warrants in payment of the debts thus created.

In laying out and constructing this road and in the issuance of warrants for its establishment, the commissioners' court must not overlook the provisions of the Acts of the Forty-second Legislature, General Laws, Chapter 163, page 269, limiting the amount of warrants which may be issued by a county and the manner of their issuance. By section 5 of this act, it is provided that in counties of a valuation of less than \$6,000,000 the county may not issue warrants in excess of \$3,000 annually, although counties with taxable valuations of \$6,000,000, or more, may issue warrants on the basis of \$500.00 for each million dollars of taxable valuation or fractional part thereof. There are many phases of that act, placing conditions and limitations upon commissioners' courts, which should be carefully considered and complied with in the issuance of warrants.

Warrants may be legally issued only in payment of a debt. In this connection I especially call your attention to Section 2 of Chapter 163 page 269, Acts of the Regular Session of the Forty-second Legislature, General Laws, requiring competitive bids on all public works, authorizing an expenditure in excess of \$2,000.00, etc.

Yours truly,
T. S. CHRISTOPHER,
Assistant Attorney General.

Op. No. 2867

CONSTITUTIONAL LAW — IMPEACHMENT — AUTHORITY OF HOUSE OF REPRESENTATIVES TO REMAIN IN SESSION FOR IMPEACHMENT PURPOSES AT END OF THIRTY DAY CALLED SESSION—COMPENSATION AND RIGHT TO HIRE EMPLOYEES.

1. Where the Legislature is called in Special Session by the Governor the House may consider the impeachment of a public official without submission by the Governor, impeachment being a judicial function, and may continue said hearing beyond the thirty day limitation contained in Section 40 of Article Three of the Constitution, that limitation referring solely to legislation.

2. Members of the House are entitled to compensation at the rate of ten dollars per diem for the duration of the hearing, so long as it, added to the special session, does not exceed 120 days in length.

3. The House, in exercising its judicial functions during an impeachment hearing, is of necessity authorized to employ such help as may be necessary to the proper conduct of the proceedings.

Construing: Constitution: Art. 15, Sec. 1 and 2; Art. 3, Secs. 1, 24 and 40; Revised Civil Statutes, 1925, Title 100; H. C. R. No. 6, Reg. Session 42nd Legislature; H. Bills Nos. 1 and 75, 1st Called Session, 42nd Leg.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, August 17, 1931.

Hon. Fred Minor, Speaker of House of Representatives, Capitol Building, Austin, Texas.

DEAR SIR: Your inquiry of the 15th instant addressed to Honorable James V. Allred, Attorney General, requesting an opinion of this department, has been received. The inquiry is in connection with certain proceedings now under way in the House of Representatives, as disclosed by the following statement of facts taken from your letter:

"The House of Representatives is now sitting for the purpose of hearing and considering charges of impeachment preferred against the Honorable J. B. Price, Judge of the 21st Judicial District of Texas, which charges are shown on pages 551 to 557, inclusive, of the House Journal under date of July 31st, 1931.

"The resolution providing for the method and manner of conducting the investigation is set out at page 558 of the House Journal, and is in conformity with the resolutions adopted in previous sessions of the Legislature relating to the hearing of impeachment charges.

"The right of the House of Representatives to sit after the expiration of the thirty day period of the First Called Session has been called in question, based upon Section 40 of Article 3 of the State Constitution which reads as follows:

"Section 40. When the Legislature shall be convened in Special session, there shall be no legislation upon subjects other than those designated in the proclamation of the Governor calling such session or presented to them by the Governor; and no such session shall be of longer duration than thirty days."

"The First Called Session of the Legislature convened on July 14th, 1931. On July 31st, the impeachment charges were preferred against Judge Price, as above stated. The thirty day period expired at midnight of August 12th. The House Concurrent Resolution relating to adjournment provided that while the House would stand adjourned for legislative purposes at midnight of August 12th, 1931, it would continue to sit for the purpose of hearing the impeachment charges against Judge J. B. Price which had heretofore been filed, whereupon the House adjourned at midnight of August 12th so far as legislative matters were concerned, but adjourned until nine o'clock A. M. of August 13th for the purpose of continuing the hearing of the impeachment charges, which hearing was in reality begun on the afternoon of August 12th. The adjournment resolution, as well as the motion for adjournment until the following day above referred to, were unanimously adopted, and pursuant thereto, the House has continued to sit from day to day, and is now in session for the purposes above herein set out."

Your first inquiry, based upon the foregoing statement of facts, reads as follows:

"(1) Is the House of Representatives authorized under the Constitution and laws to continue in session for the purpose of hearing the charges of impeachment now under consideration after the expiration of the thirty day period in which the First Called Session of the Legislature sat for the consideration of legislative matters?"

In reply to the above quoted inquiry, we desire to call your attention to certain Constitutional and Statutory provisions. Article Fif-

teen of the Constitution of the State of Texas deals with impeachment. Section One of said Article reads as follows:

“The power of impeachment shall be vested in the House of Representatives.”

Section Two of said Article reads as follows:

“Impeachment of the governor, lieutenant governor, attorney general, treasurer, commissioner of the general land office, comptroller and the judges of the supreme court, court of appeals and district courts, shall be tried by the Senate.”

The power of impeachment given the House of Representatives under the above constitutional provisions is limited as to the officers who may be impeached, but is limited by no specific procedural provisions.

Article Three of the Constitution of Texas deals with the Legislative Department. Section One of that Article provides that the *Legislative power* of the State shall be vested in a Senate and a House of Representatives, which together are styled “The Legislature of the State of Texas.” In contrast, note that the provisions of Article Fifteen of the Constitution relate to “Impeachment”, and vest said power, not in the Legislature, but in the House of Representatives. Section Forty of Article Three, quoted above in your letter, deals with the exercise of legislative power, and appears under that sub-head of Article Three (dealing with the Legislative Department) which treats of “proceedings”. Be it noted that this refers to the proceedings of the Legislative Department of the State Government, and in contrast note that Article Fifteen, pertaining to impeachments, sets up no procedural limitations. Sections Twenty-nine to Fifty-eight inclusive of Article Three of the Constitution prescribe the proceedings, requirements, and limitations on the exercise of the legislative powers of the government by the legislative department. They have no application to the exercise of a judicial power, viz: That of impeachment by the House of Representatives, which in impeachment matters sits as a judicial body.

The leading case on this question is a Texas Supreme Court case, and though that decision has support in other jurisdictions we have been able to find no decision to the contrary. We refer to Ferguson vs. Maddox 114 Texas 85, 263 S. W. 888, and quote as follows from page 891 of 263 S. W. .

“The powers of the House and Senate in relation to impeachment *exist at all times* (italics ours). They may exercise these powers during a regular session. No one would question this. Without doubt, they may exercise them during a special session, unless the Constitution itself forbids. It is insisted, that such inhibition is contained in Article Three, Section Forty . . . This language (of this Article) is significant and plain. It purposely and wisely imposes no limitation, save as to legislation. As neither House acts in a legislative capacity in matters of impeachment, this section imposes no limitation with relation thereto, and the broad power conferred by Article 15 stands without limit or qualifications as to the time of its exercise.

“From the inception to the conclusion of impeachment proceedings the House and Senate, as to that matter, are not limited or restricted by legis-

lative sessions. . . . At the end of a legislative session the House does not cease to exist, and its power, so far as its proper participation in a pending impeachment proceeding is concerned, is not affected, or the effect of what it has already properly done impaired.

"The fact that the impeachment trial may extend from one legislative session into another and cover parts of both is not material. The Constitution creates the court; it does not prescribe for it any particular tenure, or limit the time of its existence. By indubitable reason and logic it must have power and authority to sit until the full and complete accomplishment of the purpose for which it was created, limited, perhaps, by the tenure of office of the persons composing it."

The foregoing opinion is in full accord with a former opinion of this department appearing at page 427 of Opinions of the Attorney General 1916-1918. That able opinion was written by the Honorable Luther Nickels of Dallas, then Assistant Attorney General and later Judge of the Commission of Appeals. A like conclusion was reached by the New York Court in *People vs. Hayes*, 143 N. Y. Supp. 325, a case arising out of the impeachment and removal from office of Governor Sulzer. The New York Court used this language in that case:

"It (the assembly) is the exclusive and final judge of the occasion or time it shall select to impeach, and the acts of the Governor it may specify as grounds for impeachment."

See also *Ex Parte Wolters*, 144 S. W. 531, and 46 Corpus Juris 1001.

Title 100 of the 1925 Revised Civil Statutes of Texas, mentioned by you in your letter, deals with removal of public officers, and Articles 5161, 5162 and 5163 thereunder deal with impeachment. Legislative authority is there found for the procedure now being followed by the House. The Articles mentioned were enacted in pursuance of Constitutional power. The Constitution having granted the impeaching power without restriction as to time, the Legislature, acting thereunder, has by legislation regulated to a certain extent the time of its exercise.

We deem the matter too well settled in Texas to admit of further discussion. It is settled by the Constitution, by statute and by judicial and departmental opinions. There is no dissenting voice; there can, in good reason, be none. The impeaching power is a judicial power, granted to the House of Representatives for exercise in those enumerated cases where the influence or official position of the accused is such that the ordinary processes of law would be ineffective to secure his removal. It is necessary for the preservation of pure government and to preserve the equal balance of power between the three co-equal departments of the government. If it be said that this practically unlimited power is subject to abuse, the answer is that the same observation is true of all grants of power. Except in the post-war Reconstruction Period this nation has witnessed far less usurpation of Constitutional power by its legislative than by its judicial bodies. In final analysis, the stability and Constitutional functioning of all governments depends not upon mere forms, but upon the men who administer them. Our Constitution saw fit to grant this broad power to the Legislature despite the fact that it was framed

by the very men who had suffered most from governmental tyranny during the trying Reconstruction Days. The Constitutional Fathers saw the necessity of creating a governmental body to act in impeachment matters sufficiently strong and free from local influence to give on the one hand an impartial trial, and on the other, to adequately protect the public.

It is our opinion, and you are so advised, that whenever the Legislature meets in a regular or called session the House may consider any impeachment matter thereat, and after expiration of the *legislative* session, may continue to hear the *judicial* matters (impeachments) then pending before it. When the Governor calls a special session of the Legislature, he calls it to consider such legislative matters as he sees fit to submit and such judicial matters (impeachments) as it sees fit to institute. The time for consideration of the legislative matters ends in thirty days; the time for considering an impeachment proceeding then pending before the House expires only with the term for which that House is elected. The House may convene in regular session, called session, or in any of the modes set out in Article 5962, but once it enters into the consideration of a judicial matter it sits without regard to the rules governing the legislative department and may continue its hearing until it sees fit to adjourn. In this respect its power is exclusive, complete, final and subject to no review by any court or executive department. *State of Oklahoma ex rel. Trapp, Acting Governor vs. Chambers* 220 Pac. 890, 30 A. L. R. 1144. Your first question is answered in the affirmative.

Your second question reads as follows:

“(2) Will the members of the House be entitled to receive the sum of ten dollars per day as compensation while sitting for the purpose of hearing such impeachment charges, and if so, will the Speaker of the House be authorized to sign warrants therefor without further action of the House by resolution or otherwise providing for such compensation?”

Section 24 of Article 3 of the Constitution, as amended by proposal ratified Nov. 4, 1930, reads in part as follows:

“Members of the Legislature shall receive from the public Treasury a per diem of not exceeding \$10.00 per day for the first 120 days of *each session* (italics ours) and after that not exceeding \$5.00 per day for the remainder of the session. . . .”

House Concurrent Resolution No. 6, Regular Session 42nd Legislature, p. 891, General Laws 42nd Legislature, fixes the pay of members of the 42nd Legislature at \$10.00 per day for the first 120 days of the session and thereafter at the rate of \$5.00 per day for the remainder of the session. Article 5962, Revised Civil Statutes of 1925, reads in part as follows:

“The members of the House and Senate, when either shall be sitting for impeachment purposes, and when not in session for legislative purposes, shall receive the per diem fixed for members of the legislature during legislative sessions or out of the contingent funds of the respective Houses, and the agents of the House or Senate . . . shall be paid as may be provided in the resolutions providing therefor, out of said contingent funds.”

It is fundamental that the Legislature could not, by law, provide for payment of compensation at an impeachment session at a rate higher than that permitted by the Constitution for legislative sessions. The statute quoted fixes the pay at the rate of compensation allowed during legislative sessions. The Constitutional provision and the Resolution referred to fix this rate at \$10.00 per day for the first 120 days of the session. This Department has previously held that the word "session" as used in the Constitutional provision mentioned is broad enough to include an impeachment session of the House as well as a legislative session. Opinions of Attorney-General 1924-26, p. 329.

The expression "each session" as used in Section 24 of Article 3 of the Constitution means each and every session including each special session. It does not limit the \$10.00 compensation to the first 120 days of an elective term during which the Legislature may be in session. It applies to each separate session of each duly elected Legislature. Such was the uniform Legislative interpretation of Article 3, Section 24, before amendment, and since the same words are carried forward in the amended section, the point is too well settled to be questioned now. Your letter of inquiry contains this statement:

"No resolution has been passed, however, (pertaining to this impeachment hearing) providing for the compensation of members of the House except a resolution passed during the early part of the Regular Session of the Forty-Second Legislature, fixing the compensation at ten dollars per day."

It follows from what was said in response to your first inquiry that your present hearing is a continuation of the First Called Session of the Forty-second Legislature. The rate of compensation in this impeachment proceeding is fixed by the above quoted resolution, statute, and constitutional provision. House Bill No. One of the First Called Session of the Forty-Second Legislature makes an appropriation of \$150,000.00 to pay the per diem and mileage of the members and other expenses of the First Called Session of the Forty-second Legislature. House Bill No. 75 of the First Called Session of the Forty-Second Legislature makes an additional appropriation of \$50,000.00 for the same purposes. You may continue to sign warrants thereon for pay of the members so long as those two appropriations are not exhausted, since your present proceeding is a part (though a judicial, not a legislative part) of the First Called Session of the Forty-Second Legislature. Attention is directed to those provisions of House Bill No. 75 which expressly authorizes payment of per diem etc., of "post-session" work of the First Called Session of the Forty-Second Legislature. While you are not now in a "post-session", nevertheless the act evidences an intent to pay for the present work. Once these two appropriations are exhausted you will have no authority to draw warrants nor the House to make further appropriation by resolution, even with concurrence of the Senate, for the appropriation of money is a legislative function which the Legislature is now powerless to exercise. Opinions of Attorney General, 1924-26, p. 283. In the event the aforementioned appropriations are exhausted before the present

proceeding ends, the members of the House will have valid claims for mileage and per diem, based upon pre-existing law, for payment of which a subsequent Legislature could make a valid appropriation Opinions of Attorney-General 1924-26, p. 329.

Your third inquiry reads as follows:

“(3) Under the conditions hereinabove set out, is the House entitled to retain employees during the time it shall continue to sit for the purposes hereinabove set out at the same compensation paid them during the thirty day period it sat for the consideration of legislative matters, as provided for in the resolution hereinabove referred to, which was unanimously adopted by the House on August 14th, 1931, providing for the retention of such employees.”

While we do not have a copy of the resolution referred to, since it has not yet been printed in the Journal, we quote the following explanatory paragraph from your letter:

“On August 14th, the House provided for a resolution for the retention of such employees as the Speaker might deem necessary, including stenographers, pages, porters and other employees, who shall receive the same compensation for their services as was paid during the thirty day period in which the Legislature sat for the consideration of legislative matters, which resolution was unanimously adopted by the House, and pursuant to which all necessary employees have been retained.”

The power of the House to sit during an impeachment hearing carries with it, by necessary implication, the power to employ such clerical help as may be necessary for the effective and efficient conduct of the hearing. Article 5962 expressly provides that the House when sitting for impeachment purposes, may employ agents to be paid as provided in resolutions of the House providing therefor out of any appropriations then existing or thereafter to be made. The House has express statutory authority, constitutionally granted, to retain employees during the present hearing and may pay them out of the appropriations heretofore made by House Bills Nos. 1 and 75, passed during the legislative session of the First Called Session of the Forty-Second Legislature. The simple House Resolution of August 14 was not in any sense an appropriation. The appropriation had been previously made. The House must express its will in some manner in determining the number of employees necessary to be retained for the present hearing. It has done so by simple resolution, passed in pursuance of express statutory authority. We answer your third question in the affirmative.

Very truly yours,
R. W. YARBOROUGH,
Assistant Attorney General.

Op. No. 2871

FEES—DISTRICT CLERK—STATUTES

1. Clerk entitled to a fee of fifteen cents for “entering appearance” of each party to a civil suit upon the clerk’s docket.
2. Article 3927 construed. Article 2046 construed.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, October 12, 1931.

Hon. Tom G. Oliver, Jr., County Attorney, Hays County, San Marcos, Texas.

DEAR SIR: We have your letter of September 3rd asking this department for an opinion as to the proper fees to be charged by the district clerk in civil suits, wherein a number of nonresident defendants were cited by citation by publication. The question propounded by you may be stated in substance as follows:

"In a civil suit wherein citation by publication was had upon a number of nonresident defendants who failed to appear and answer, and an attorney was appointed by the court to represent such nonresident defendants, and such attorney filed an answer for said defendants and participated in the trial in their behalf, is the district clerk entitled to charge and collect a fee of fifteen cents for each of said defendants, under Article 3927, Revised Civil Statutes of 1925?"

We acknowledge with appreciation the very able brief of Honorable Will S. Barber, a member of the San Marcos Bar, in which he urges that the clerk is not entitled to such fee; also your own well considered interpretation of the law in which you have arrived at the conclusion that the clerk is entitled to such fee.

The question submitted to you is not, strictly speaking, one which arises "in the prosecution and defense of an action in the district or inferior courts", upon which we are generally required to advise county and district attorneys, yet because of an opinion rendered by a previous administration and on account of its general importance, we feel it our duty to pass upon it. The previous opinion referred to is in the form of a letter, written by Honorable H. Grady Chandler, then Assistant Attorney General, under date of March 27, 1929, addressed to Mr. Lee Donalson, District Clerk, San Marcos, Texas. In this opinion Mr. Chandler did not discuss the question at length, but merely held that, in his opinion, a fee should be charged by the district clerk for "entering the appearance" of each party to the suit. We agree with this conclusion:

Article 3927 reads as follows:

"The clerk of the district court shall receive the following fees in civil cases for his services:

" . . . Entering appearance of each party to a suit, to be charged but once, 15c."

The theory is advanced by Judge Barber that the determination of this question involves the proper construction of the term "entering appearance", used in Article 3927; and that, while a party to a civil cause may "enter an appearance" in various modes, yet the "entering appearance" contemplated is that special character of appearance provided for in Article 2046, Revised Civil Statutes of 1925, reading as follows:

"The defendant may, in person or by attorney, or by his duly authorized agent, enter an appearance in open court. Such appearance shall be noted by the judge upon his docket, and entered in the minutes, and shall have

the same force and effect as if citation had been duly issued and served as provided by law."

It is contended that the service for which the clerk is entitled to receive a fee of fifteen cents for "entering appearance of such party to a suit" is the entering in the minutes of the court by the clerk, as a matter of record, of the appearance of a "defendant" *only*, upon the occasion or in the manner provided by Article 2046, *supra*.

A "party" to a civil suit, either plaintiff, intervener or defendant, may enter his appearance in court by numerous methods. The plaintiff enters his appearance when he files his petition with the clerk. The defendant may enter his appearance by written answer, waiver, by various motions, or in the manner provided by Article 2046. From a practical standpoint, a record is seldom made in the minutes of the "entering of appearance" of any of the parties until the final judgment is written. As a general rule, even when an appearance is entered in the manner provided in Article 2046, no record is actually made in the minutes until the final judgment or order of the court, in which it is ordinarily recorded that each of the parties entered their appearance either in person or by their attorneys of record.

It is significant that the special "entering of appearance" permitted under Article 2046 is confined to the *defendant*, who is only *one* of the "parties to a suit"; while, on the other hand, Article 3927, *supra*, provides that the clerk of the district court shall receive a fee of fifteen cents for "entering appearance of each *party* to a suit." The expression "each party to a suit" includes, of course, each plaintiff and each defendant. There need be no confusion in properly construing the expression "entering appearance", as Article 3927, if it is borne in mind that the clerk is paid not for what the defendant does or for the manner in which he enters his appearance, but for the service which the clerk performs in "entering the appearance" of either or all parties to the suit.

The clerk of a district court is entitled to a fee for filing a petition, an answer or other pleading in any civil cause. He has earned this *filing fee*, however, then he endorses upon the petition the number of the suit, the date on which it was filed, signs his name officially thereto, and files same among papers of the cause. (Article 1972, Revised Civil Statutes, 1925). No further act on the part of the clerk is necessary, when he has complied with these requirements, in order to earn his fee for filing the petition.

Being compensated by fees, however, the district clerk is generally paid a separate and distinct fee for each and every service he performs. In addition to the filing of the papers, the clerk is required under Article 1973 to:

"Keep a file docket which shall show in convenient form the number of the suit, the names of the attorneys, the names of the parties to the suit and the object thereof, and in brief form the officer's return on the process, and *all subsequent proceedings had in the case*, with the dates thereof."

The "subsequent proceedings" in a case undoubtedly would include the record of the entry of an appearance by either party, wheth-

er by petition, answer, waiver, motion, or the special appearance provided for in Article 2046. The keeping of this record by the district clerk is of utmost importance of the court, to the parties and their attorneys, and to the orderly administration of justice. A proper discharge of these duties involves careful and detailed efforts on the part of the district clerk for which we believe the law intended to provide compensation. It seems to us that when a clerk enters upon his docket a notation to the effect that an answer, waiver, or special appearance was filed under a certain date by a named defendant, he has just as effectively "entered the appearance" of that particular party to the suit as though it has been recorded in the minutes.

Authorities are numerous to the effect that a statute shall be construed so as to give it, if possible, a reasonable and practical construction; and that if two constructions, one reasonable and the other unreasonable, may be placed upon a statute, it shall be construed in such a manner as shall place the reasonable interpretation thereon. There is no reconciling the theory that the Legislature, having provided for a fee of fifteen cents for "entering the appearance of each party to a suit" could have intended to limit the payment of this fee to the appearance of a defendant only; and then only in the event such defendant entered his appearance in the general manner provided by Article 2046.

We have, therefore, concluded, and you are so advised, that the district clerk is entitled to a fee of fifteen cents for entering the appearance of each and every party to a suit whether plaintiff, defendant, or intervenor, where such party actually makes his appearance in any of the manners provided by law, and where the clerk actually makes an entry of such appearance upon his docket with the dates thereof.

All other opinions of this Department in conflict herewith are hereby withdrawn.

Yours very truly,

JAMES V. ALLRED,

Attorney General of Texas.

Op. No. 2874

REMOVAL FROM OFFICE BY JUDGMENT OF CONVICTION—APPOINTMENT TO SERVE PENDING APPEAL—WHEN DOES SUCH APPOINTMENT END?

1. "When the sheriff has been convicted of a felony, the Court, by proper order, must remove him from office.
2. In case he appeals, the district court in which he was convicted may suspend him from office pending such appeal. In case this is done, said court, alone, has authority to appoint some person to hold the office pending the appeal.
3. Such appointee will hold the office only during the remainder of the term of the suspended sheriff and not thereafter.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, November 6, 1931.

Hon. Leslie D. Williams, County Judge, Bastrop County, Bastrop, Texas.

DEAR SIR: Your letter under date of November 2, 1931, addressed to the Attorney General, has been duly received. Said communication is in words and figures as follows:

"Will you kindly give me an opinion as to the proper procedure in connection with the appointment of a sheriff in this county? I am giving you below the circumstances and the statutes in connection therewith:

"Our sheriff, Mr. Woody Townsend, was tried in cause No. 20,385 in the 126th District Court of Travis County, Texas, for extortion. He was convicted on a verdict of the jury and given two years in the penitentiary.

"The judgment of the court, entered October 25, 1931, provided:

" . . . It is therefore ordered, adjudged and decreed by the court as provided in Article 5968, Revised Civil Statutes of Texas, that said defendant, Woody Townsend, be, and is hereby removed from office of sheriff of Bastrop County, Texas.'

"Motion overruling new trial, dated October 30, 1931, provided:

" . . . It further appearing to the court that it is to the public interest to suspend the defendant from office of sheriff of Bastrop County, Texas, during the pendency of the appeal from the judgment entered in this cause;

"It is therefore further ordered, adjudged and decreed by the court, for the reasons hereinbefore stated, that the said defendant, Woody Townsend, be, and is hereby suspended from office of sheriff of Bastrop County, Texas, during the pendency of said appeal, as provided in Article 5969, Revised Civil Statutes of the State of Texas.'

"Sentence dated October 30, 1931, provided:

" . . . It is therefore ordered, adjudged and decreed by the court that the operation of the judgment and sentence entered herein, except that portion of the judgment suspending defendant from office, be, and is hereby suspended during the pendency of such appeal.'

"Article 5969 of the Revised Civil Statutes provides for the removal of all county officers upon conviction by a petit jury.

"Article 5969 of the Revised Civil Statutes provides that the appeal supersedes the removal, unless the judge of the court rendering such judgment shall deem it to the public interest to suspend such officer from office pending the appeal; and *in that case the court shall proceed as in other cases of the suspension of officers from office as provided herein.*

"Article 5970, 5971, 5976, 5977, 5978, 5979, 5980, 5981 and 5982 outline such a procedure for the removal of officers.

"Article 2355 of the Revised Civil Statutes gives the commissioners' court power ' . . . to fill vacancies in the office of: county judge, county clerk, sheriff . . . Such vacancies shall be filled by a majority vote of the members of said court present and voting, and the person shall hold office until the next general election.'

"Under the orders of the court in the Townsend case, in one instance, he is 'removed' from office, and, in others, he is 'suspended', neither of which instances would create a 'vacancy'.

"I have failed to find in the statutes whose duty it is to appoint a sheriff in his place pending this appeal. Would you please give me an opinion as to whether it is our duty and right to fill the position pending the appeal and whether or not such appointment would be until the next general election or until a final hearing on the appeal of his case?"

Article 5969, Revised Civil Statutes of Texas, 1925, reads as follows:

"All convictions by a petit jury of any county officers for any felony, or for any misdemeanor involving official misconduct, shall work an immediate removal from office of the officer so convicted. Each such judgment of conviction shall embody within it an order removing such officer."

Article 5969, of said statutes, is in the following language:

"When an appeal is taken from such judgment by the officer removed, such appeal shall have the effect of superseding such judgment, unless the court rendering such judgment shall deem it to the public interest to suspend such officer from the office pending such appeal; and in that case the court shall proceed as in other cases of the suspension of officers from office as provided herein."

According to the statements made in your letter, Woody Townsend, Sheriff of Bestrop County, was tried in the District Court of Travis County on a felony charge and was convicted, and the final judgment of conviction was entered on the 25th day of October, 1931. In said final judgment of conviction, the court, in obedience to the plain mandatory duty imposed by statute, incorporated in said final judgment an order removing said Townsend from the office of sheriff of Bastrop County.

It appears further that the defendant appealed from said judgment of conviction, and according to the terms of the statute the perfection of such appeal automatically suspended the judgment of conviction, including the order of the court removing said sheriff from office.

However, exercising the discretion granted by Article 5969 of the statutes, the court made its order suspending said Woody Townsend from the office of sheriff during the pendency of said appeal; and it appears to be necessary, or proper, for a sheriff to be appointed to fill the office of sheriff ad interim.

In this connection and under the above state of facts you propound two inquiries, which are in meaning as follows:

1. Whether the commissioners' court of Bastrop County has the right and duty, to fill, by appointment, the office of sheriff pending the appeal aforesaid; and,
2. Whether such appointment, when made, is until the next general election or until the appeal of Sheriff Townsend has been acted upon.

In a case like the one under consideration, in which a county officer has been removed from office by reason of his conviction of a felony charge, and thereafter suspended from office pending his appeal, there is no specific direction for the appointment of one to discharge the duties of the office pending such appeal, yet, said Article 5969 concludes with this provision:

"* * * and in that case the court shall proceed as in other cases of suspension of officers from office as provided herein."

We understand the phrase "as provided herein" to refer to this title, in which generally is treated the subject of removal of public officers from office, so that in order to answer your first inquiry we shall look to the procedure provided for by the court to follow in other cases of the suspension of county officers from office, for that is to govern the court in the case under consideration.

Immediately following above Article 5969, and beginning with Article 5970 and continuing through several subsequent articles, is prescribed the procedure to be followed in the preferring of charges for removal against county and precinct officers bringing an accused into court and the method of trial of accused on such charges.

Article 5982 prescribes the procedure in a case in which a county officer is proceeded against under the statute for removal from office. It is provided that at any time after the issuance of the order and citation for the accused officer has been issued, the district judge may, if he sees fit, suspend temporarily from office the officer whom the petition is filed against and appoint for the time being some other person to discharge the duties of the office, and said article sets out other matters of procedure not material to your inquiry.

It is the opinion of this department that the above provision of Article 5982 is part of the procedure, referred to in Article 5969, and authorizes the district court which tried and has jurisdiction of the Townsend case to appoint some person to act as sheriff during the period of Townsend's suspension. If we are correct in our construction of the statute, then the district court of Travis County, in which Townsend was convicted, is authorized to make such appointment; and, by a familiar rule of construction, its authority would be exclusive.

Under the provisions of Article 5982, the person appointed by the district court of Travis County must execute a bond in such sum as the judge thereof may name, with at least two good and sufficient sureties, payable to Woody Townsend for "all damages and costs that he may sustain by reason of such suspension from office in case it should appear the cause or causes of removal are insufficient or untrue." Attention is directed to the fact, however, that, under the provisions of Article 5982, the district court which entered the order of suspension has the authority to impose such other conditions as he may see fit. We will not presume to suggest to the learned district judge who entered the order of suspension any other conditions, but it occurs to us that he would have the right to provide, for instance, that the person appointed by him should have the right to pay out the necessary and reasonable expenses of the operation of such office, including a reasonable compensation for himself, and should only account to the removed officer for the residue, if any, of the fees, or other emoluments, incident to the office.

In reply to your second question, it is the opinion of this department that the appointee of the court can hold office only during the pendency of Townsend's appeal, as provided in Article 5982. This question is fully answered by the order of the court, set out in part in your communication, wherein it is ordered that "said defendant, Woody Townsend, be and is hereby suspended from office of sheriff of Bastrop County, Texas, *during the pendency of such appeal.*" (Italics ours).

Yours very truly,

F. O. MCKINSEY,

Assistant Attorney General.

Op. No. 2875

STATUTES—ARTICLE 6674-N—EMINENT DOMAIN—COUNTY JUDGE
DISQUALIFICATIONS—NEPOTISM—ARTICLE 432

1. A county judge is not disqualified to sit in a condemnation proceeding by reason of "interest" because of the fact that he is county judge and presiding officer of the commissioners' court where condemnation proceedings are instituted on behalf of the State through the commissioners' court.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, September 29, 1931.

Mr. Richard H. Parks, County Attorney, Boerne, Texas.

DEAR SIR: This will acknowledge yours of September 24, in which you request that in connection with certain condemnation proceedings now pending in your county we answer the following questions:

"(a) Under the facts as given above are the condemnation proceedings void?"

"(b) Is the county judge disqualified by reason of being a member of the commissioners' court that brings the suit?"

The request for an opinion of this department upon these questions is based upon alleged facts, raised by the pleadings, as follows:

"On August 21st condemnation proceedings were instituted in this county in the name of the State of Texas, acting through the commissioners' court of Kendall County, as plaintiff, against E. H. Angier, et al, as defendant. This action was brought to condemn defendant's land to be used as a right-of-way for State Highway No. 27, under the provisions of Article 6674-N, R. C. S. The petition was duly filed with the county judge, who thereupon appointed three freeholders of the county as special commissioners. The commissioners then proceeded to notify the parties, as provided by law, and after five days to hear the evidence and to assess the damages incident to the taking of the land. The defendant, through his attorneys, has raised the following objections to the procedure: (a) That the regular county judge, being the presiding officer of the commissioners' court and therefore a party plaintiff to the suit, is disqualified to sit in the case or to make any orders therein. (b) That being so disqualified, the county judge had no right to appoint the special commissioners to assess damages. (c) That the special commissioners so appointed were necessarily disqualified and interested parties because appointed by an interested and disqualified judge. (d) That, as a matter of fact, one of the commissioners so appointed was a first cousin of the county judge, by marriage, thereby constituting a violation of the Nepotism Act and rendering such commissioner disqualified to serve in the case. (e) That, as a further matter of fact, this same commissioner had previously acted as one of a committee to deal with landowners, including the defendant Angier (and to try to settle and agree on the amount to be paid for the lands. And (f) that another of the commissioners appointed is disqualified because he was one of the signers of a petition asking the commissioners' court to acquire the new highway. These objections are set out in a petition filed by defendant's attorneys asking for an injunction and damages."

Inasmuch as your last question presents an abstract proposition, it may be passed upon without reference to the particular facts in this case. The first question is one of fact, which we assume that you are admitting as raised under the pleadings in subdivisions (d), (e)

and (f) of your statement of facts. We will answer the questions which you present in their reverse order.

Article 5, Section 11 of the Constitution of the State provides:

"No judge shall sit in any case wherein he may be interested, or where either of the parties may be connected with him, either by affinity or consanguinity, within such a degree as may be prescribed by law, or when he shall have been counsel in the case. When the Supreme Court, the Court of Criminal Appeals, the Court of Civil Appeals, or any member of either, shall be thus disqualified to hear and determine any case or cases in said court, the same shall be certified to the Governor of the State, who shall immediately commission the requisite number of persons learned in the law for the trial and determination of such cause or causes. When a judge of the District Court is disqualified by any of the causes above stated, the parties may, by consent, appoint a proper person to try said case; or upon their failing to do so, a competent person may be appointed to try the same in the county where it is pending, in such manner as may be prescribed by law.

"And the District Judges may exchange districts, or hold courts for each other when they may deem it expedient, and shall do so when required by law. This disqualification of judges of inferior tribunals shall be remedied and vacancies in their offices filled as may be prescribed by law."

This section of the Constitution is carried forward in proper enacting legislation in Article 15, Revised Civil Statutes of 1925, said article providing as follows:

"No judge or justice of the peace shall sit in any case wherein he may be interested or where either of the parties may be connected with him by affinity or consanguinity within the third degree, or where he shall have been counsel in the case.

This portion of the Constitution and this statute have been passed upon a good many times by the courts of this State and the law in relation thereto seems to be fairly well settled. Of course, in many instances, there are questions of fact that must be passed upon in determining a judge's disqualifications to sit in the trial of any cause. In a condemnation proceeding, it seems that there would be no question of fact to be considered, so far as the interest of a county judge is concerned; and the objections raised by the parties, under the facts which you submit, present only questions of the personal interest of the judge and do not, in any manner, relate to his having been of counsel for any party, or his being related within the prohibited degree, either by affinity or consanguinity.

One of the earlier cases, and almost directly in point, is that of *Clack vs. Taylor County*, 3 App. C. C. 201. That case raised the question of the disqualifications of the judge, the facts of the case being that Taylor County wished to establish two public roads upon land claimed by the appellant, and paid appellant \$300.00 as damages for taking his land for said purpose. It turned out that the land did not belong to the appellant, but belonged to one Murray, who proved his title, and, thereupon, Taylor County was required to pay the said Murray damages for taking the land. The county then brought suit for \$300.00 against the appellant, Clack, for the amount erroneously paid upon the ground that payment of the same had been obtained by means of fraudulent and false representations.

In the trial court the question of the disqualification of the judge was raised by the following motion :

"The judge of the court is the presiding officer of the commissioners' court of Taylor County, Texas, and is the person with whom the principal part of the negotiations between plaintiff and defendant were conducted about the opening of said roads, and is the most material witness for plaintiff in the case. Defendant further says that the judge of this court is prejudiced against him, and that he caused this suit to be instituted against him, and has advised with the attorneys representing the plaintiff about the same as an attorney, and has on a great many occasions expressed the opinion that plaintiff should recover of defendant in this action. That he has advised with the commissioners' court of said county as an attorney, and given them his opinion as such, and has in various other ways rendered himself, both in law and equity, disqualified from presiding fairly and impartially in this cause."

In this case the county judge's testimony was as follows :

"I am county judge of Taylor County, and was when the negotiations with the defendant about opening the roads through his farm were had. I was present and took part in all of said negotiations, and am familiar with all the facts connected with the same, and I am an important witness for the plaintiff in this cause. The plaintiff relies on my testimony with that of others to make out its case. My opinion is, that in said transaction with defendant he perpetrated a fraud on the plaintiff, and I have so advised the commissioners' court. I believe that plaintiff has a cause of action against defendant, without further investigation. My mind is made up on the facts and law of the case, and I am satisfied that plaintiff ought to recover. I am not an attorney in the case, and all my action in it has been as county judge of Taylor county. I have not managed the case, but at the last term of the court, when the county attorney, Mr. Hardwick, made an agreement with the attorney of the defendant to continue the cases, I refused as judge of the court to be governed by said agreement, and told Mr. Hardwick he must go to trial. He refused to do so, and withdraw from the case, and I got down off the bench and called the commissioners' court together and employed Mr. Bowyer to represent the county in this case."

It will be seen that from the foregoing motion that the question was directly raised as to whether or not the judge was disqualified by reason of the fact that he was presiding officer of the commissioners' court, as well as upon other grounds. Certainly the judge's testimony makes out as strong a case as possible for his disqualifications; yet, in that case the court held that under the constitutional rule, no judge shall sit in any case wherein he may be interested or where either of the parties may be connected with him by affinity or consanguinity within the third degree, or where he shall have been counsel in the case.

The court quoted with approval from the case of Taylor vs. Williams, 26 Tex, 583, as follows :

"The interest which disqualifies a judge from sitting in a case does not signify every bias, partiality or prejudice which he may entertain with reference to the case, and which may be included in the broadest sense of the word 'interest', as contra-distinguished from its use as indicating a pecuniary or personal right or privilege in some way dependent upon the result of the cause."

The court then quotes Chief Justice Roberts from the case of Davis vs. State. 44 Tex. 523, as follows :

"The fact that the presiding judge was the person from whom the property was alleged to be stolen, in an indictment for theft, is not a good ground of disqualification, because he is not thereby shown to be 'interested' in the 'case', not being a party thereto, or liable to any loss or profit therefrom, otherwise than as any other person in the body politic."

Based upon those cases, the court lays down the rule in the Clack case, that where a county judge is a mere nominal party in actions to recover for breach of statutory bonds, made payable to himself, he has no such interest in the subject matter involved as renders him incompetent to try such cases; that the tests are: pecuniary interest, relationship, or, whether he has been of counsel. In that case the judge testified that he had acted only in his official capacity as county judge and the court held that the judge was not disqualified from sitting in the case.

It is clearly seen, therefore, that the interest which a court or judge must have in the outcome of a cause in which he is to sit, in order to disqualify him, must be a direct, personal, pecuniary interest.

The rule is affirmatively stated by Justice Brown, speaking for the Supreme Court of Texas, in the case of *City of Oak Cliff vs. State* 79 S. W. 1068, as follows:

"That where a judicial officer has not so direct an interest in the cause or matter as that the result must necessarily affect him to his personal or pecuniary loss or gain * * * then he may sit." Citing in *re Ryers*, et al. 72 N. Y. 15; 28 Am. Rep. 88.

The Supreme Court in the same case quotes with approval Mr. Work's *Treaties on Courts* as follows:

"The interest which will disqualify a judge must be direct and immediate and not contingent and remote." *Work's on Courts*, page 396.

Hubbard vs. Hamilton County, 261 S. W. 990, quotes with approval *Taylor vs. Williams*, 26 Tex. 583, as follows:

"The interest meant is a pecuniary interest; that is, such an interest as is capable of being valued by a pecuniary standard." This language refers to the provisions of Article 5, Section 11 of the Constitution.

The case of *McInnis vs. Wallace*, County Judge, 44 S. W. 537, bears very materially upon the question before us. This was a suit by *Atascosa County*, acting through the county judge, *N. R. Wallace*, and the said county judge, *N. R. Wallace*, sat in the trial of the case. The question of his qualification to so sit was raised under the provisions of Article 5, Section 11 of the Constitution. The court said that the interest, which disqualifies a judge from sitting in a case, does not signify every bias, partiality or prejudice which he may entertain with reference to the case, which may be included in the broadest sense of the word "interest", as contradistinguished from its use as indicating a *pecuniary* or personal right or privilege in some way dependent upon the result of the case; citing *Taylor vs. Williams*, *supra*.

In *King vs. Sapp*, 66 Tex. 519, it was said that the Constitution by especially naming those cases where a judge may be interested because of personal feeling, though he may not gain or lose by the

result of the suit, doubtless intended to limit all other cases of interest to such as would be a pecuniary nature. After citing this case and that of Grady vs. Rogan, 2 Willson Civil Cases, Court of Appeals, 259, the court reached this conclusion: That the county, for whose interest and benefit the suit was brought, and judgment recovered, was the real party at interest, the judge being only the nominal party; and that the court could not ingraft upon our Constitution or statutes, as a disqualification of a judge, the fact that he is a nominal party.

In a condemnation proceeding such as we have, which, as you state, has been brought in the name of the State, (and which, to our mind, is the only proper proceeding for condemnation of a State designated highway under Article 6674-N, Revised Civil Statutes of 1925), although the county judge, as presiding officer of the commissioners' court, which has been designated as an agent of the State for the purpose of condemning right-of-way for a State designated highway, may be nominally a party, yet the real plaintiff in the case is the State of Texas. Whatever interest the county judge may have, if any, is only such interest as he may have in common with the citizenship of his county; or, more properly, in common with the citizenship of the entire State; and, following the court in the McInnes case, supra, undoubtedly the judge could have no such pecuniary interest in the case as would disqualify him. Undoubtedly, he is only a nominal party and does not come within the prohibitive provisions of Article 5, Section 11 of the Constitution. This seems very clear from the many cases already cited.

In Hubbard vs. Hamilton County, supra, Chief Justice Cureton of the Supreme Court has said that the rule is elementary that an interest, which a judge has in common with many others in a public matter, is not sufficient to disqualify him. The same conclusion and statement of the law is found in 33 C. J. 995, where it is said that:

"It is held that an interest which a judge has in common with many others in a public matter is not sufficient to disqualify him." See also Williamson v. Cayo, 211 S. W. 795, together with many other authorities cited in Corpus Juris.

It is also said in 33 C. J. 996, that a judge is not disqualified by reason of being a judge of the county which is a party litigant, citing McConnell vs. Goodwin, 189 Ala. 390; 66 Southern 675; Ann. Cases 1914-A 839.

The interest which is sufficient to disqualify a judge must be a direct, real and certain interest in the subject matter of the litigation, not merely indirect, or incidental, or remote, or contingent, or possible. Many authorities support this statement. Other cases bearing upon this general issue being as follows:

Dallas vs. Armour, 216 S. W. 222

Kansas City Life Ins. Co. vs. Jenkins, 202 S. W. 772.

Ororndoff vs. McGee, 188 S. W. 432

Nalle v. Austin, 93 S. W. 141 (as later limited by the Supreme Court itself)

Houston Cemetery Co. vs. Drew, 13 Tex. C. App. 536

Clark vs. State, 5 S. W. 115

Dicks vs. Austin College, 1 Tex. App. C. C. 1068

Other cases bearing upon the general issue not heretofore cited:

McFadden vs. Preston, 54 Tex. 403

Peters vs Duke, 1 App. C. C. 304

Grigsby vs. May, 19 S. W. 343.

It is our opinion and you are, therefore, so advised, that a county judge is not disqualified, by reason of interest, to sit as the presiding judge in a condemnation proceeding brought either by the county or by the State.

In connection with the first question as to whether or not the condemnation proceedings are void by reason of the issues raised under subdivisions (d), (e) and (f) of the statement of facts hereinabove quoted, you are advised that it is our opinion that the condemnation proceedings are not void for those reasons alone. Naturally, we could not to attempt to advise you as to whether or not the proceedings are void on any other issue than the facts as presented and the questions as raised in subdivisions (d), (e) and (f).

Former Attorney General B. F. Looney, now a member of the Court of Civil Appeals at Dallas, in a well considered opinion dated on the 16th day of February, 1914, has ruled that relationship by affinity includes only the relation of husband to his wife's blood kindred, or the relationship of the wife to the husband's blood kindred. In the same opinion he says that persons related only by affinity to the husband are not related to his wife, and, vice versa, persons related only by affinity to the wife are not related to the husband.

Applying these rules, your county judge is not related, either by affinity or consanguinity, to the appointee as special commissioner. Therefore, the condemnation proceedings would not be void for that reason.

The opinion of Judge Looney, above cited, is Opinion No. 1112, page 91, Reports and opinions of the Attorney General 1912 to 1914, and I am enclosing a copy herewith for your information.

Yours truly,

T. S. CHRISTOPHER,

Assistant Attorney General.

Op. No. 2887

JUSTICES OF THE PEACE—FEES IN CRIMINAL CASES

1. The justice of the peace is entitled to the same fees for services rendered in connection with an examining trial as he receives for similar services in misdemeanor cases. Articles 1020, C. C. P. 1925; 1052, as amended by Acts of the 41st Legislature, 1st Called Session (Chap. 55, page 155).

2. When a party charged with a felony waives examining trial, the justice of the peace is authorized to collect the same fees as if a trial were had. Article 1020, C. C. P. 1925.

3. The justice of the peace possesses the authority on his own motion, without any application, formal or otherwise, on the part of the defendant, to proceed to hold examining trial. This is true even though the defendant waives the examining trial. Article 229, C. C. P. 1925; *Porch v. State*. 99 S. W. 1124.

4. The fees allowed a justice of the peace for services rendered in an examining trial in a felony case become due and payable *only* after indictment of the defendant for the offense for which he is charged. (paragraph 4, Art. 1020, C. C. P. 1925).

5 and 6. The "trial fee" levied in misdemeanor cases when defendant is convicted shall be collected by the justice of the peace and paid over to the county treasurer in the same manner as in the case of a jury fee. The justice has no authority to retain a portion of the trial fee collected as a fee for the services rendered by him. Article 1074-1077, C. C. P. 1925.

7. The justice of the peace has no authority to collect a fee for himself from a defendant. His compensation is drawn from the general fund of the county upon an order of the commissioners' court.

8. A "trial fee" can only be collected from a defendant in the case of conviction.

9 and 10. A "trial fee" cannot be collected from the defendant in case of acquittal.

11. Article 1052, C. C. P. 1925, as amended by Acts of the 41st Legislature, 1st Called Session (Chap. 55, page 155) provides for the payment of a fee to the justice of the peace in misdemeanor cases "for each criminal action tried and finally disposed of". Therefore, the dismissal of a case is not in compliance with the statute, and no fee can be allowed upon such disposition. *Brackenridge v. State*, 11 S. W. 630.

12. When several defendants are proceeded against jointly (that is, jointly complained against) in the justice court, the magistrate is only entitled to one fee and not a fee for each defendant. That is to say, only one fee shall be allowed for an examining trial although more than one defendant is joined in the complaint.

13. A justice of the peace in a criminal case is only entitled to a trial fee of \$2.50 or \$3.00, to be determined according to the population of the county, as provided by Article 1052, as amended by Acts of the 41st Legislature, 1st Called Session (Chap. 55, page 156) in cases actually disposed of before him, and he is not entitled to an additional fee of \$1.50 for making a transcript when an appeal is taken after conviction or for the furnishing of the same to the grand jury.

14 and 15. The payment of an examining trial fee to the justice of the peace is conditioned upon the grand jury's returning a true bill against the defendant for the identical offense for which he was charged with in the justice court.

16. The justice of the peace unquestionably has the authority to defer judgment in misdemeanor cases where the defendant is convicted or pleads guilty, but in those cases where the judgment is deferred, as authorized by Article 689, C. C. P. 1925, as amended by Acts of the 42nd Legislature, Regular Session (Chapter 39, page 59), he cannot under any circumstances collect his fees until the judgment has been entered, thereby completing the final act and disposing of the case.

17 and 18. Where defendants are proceeded against separately who could have been proceeded against jointly, but one fee shall be allowed the justice of the peace in all cases that could have been so joined.

Whether two or more defendants could have been proceeded against jointly but were proceeded against separately, is a matter for the determination of the district judge to whom the account of the justice of the peace is submitted for approval. It is the duty of the district judge to fully investigate each case where more than one complaint was filed charging the defendants with the same offense, and to satisfy himself that the defendants could not have been charged jointly in the same complaint. If he is not so satisfied, he should not approve the account for more than one fee.

19. Article 1055, C. C. P. 1925, providing that half costs shall be paid officers where the defendant has satisfied the fine and cost by laying in jail, does not apply to fees due the justice of the peace since Article 1052, as amended, allows the justice of the peace a fee in misdemeanor cases "for each action tried and finally disposed of before him". This fee accrues

immediately upon the disposition of the case by a trial and is not contingent upon the collection of the same.

20. The "appeal of a case" from the justice court does not affect fees due the justice for the services rendered in connection with the trial had in his court. This official is no longer interested in the final outcome of a case and his fee no longer depends upon the final conviction of the accused.

21. There is no provision in the statute which would authorize the justice of the peace to retain a portion of the fines collected for the county as a commission. Article 950 and 951, C. C. P. 1925.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, December 8th, 1931.

To The District and County Attorneys of Texas.

GENTLEMEN: The Attorney General has received a great many inquiries relating to fees of justices of the peace in criminal cases, but but in many instances these requests have come from individuals whom we are prohibited by statute from advising. Therefore, at his suggestion, the writer will attempt to deal with the subject in general, answering the several questions submitted by quoting statutes and decisions of the courts and excerpts from former opinions heretofore rendered by this department. It is our idea to convey the information contained herein to the justices of the peace of Texas by directing this general letter to you.

1.

In view of the considerable recent legislation, we have received several inquiries desiring to know what fee the justice of the peace is entitled to for sitting as an examining court in a felony case. The answer to this question depends upon the construction of Articles 1020, Code of Criminal Procedure of 1925, and 1052, Code of Criminal Procedure, as amended by Acts of the 41st Legislature, 1st Called Session, Chapter 55, page 155. Article 1020 reads as follows:

"In each case where a . . . justice of the peace shall sit as an examining court in a felony case, he shall be entitled to the same fees allowed by law for similar services in misdemeanor cases to justices of the peace and ten cents for each one hundred words for writing down testimony, to be paid by the State, not to exceed \$3.00 for all his services in any one case."

It will be remembered that Article 1066, Code of Criminal Procedure, formerly governed those fees allowed a justice of the peace in misdemeanor cases, but it will be noted that Article 1066 was repealed by Acts of the 41st Legislature at its 1st Called Session. Prior to the repeal of this article, the fees of the justice of the peace in criminal actions tried before him were collected from the defendant only upon conviction. In the case of *Ex parte Kelley*, 111 Texas Criminal Reports, 54, 16 S. W. (2d) 728, decided by our Court of Criminal Appeals November 7th, 1928, it was held that the provisions of this article which permitted the justice of the peace to be compensated only in the event defendant was convicted, contravened Article 5, Section 11, of our State Constitution, and was therefore void.

Article 1052, Code of Criminal Procedure, as amended, reads as follows:

"Three dollars (\$3.00) shall be paid by the county to the county judge or judge of the court at law and \$2.50 shall be paid by the county to the justice of the peace for each criminal action tried and finally disposed of before him; provided, however, that in all counties having a population of 20,000 or less the justice of the peace shall receive a trial fee of \$3.00 . . ."

This statute is the basis for fees in misdemeanor cases, and considered in connection with Article 1020, Code of Criminal Procedure, wherein it is provided that the justice of the peace shall be entitled to the same fees for services rendered in connection with the examining trial as allowed by law for similar services in misdemeanor cases, prescribes those fees allowed the justice of the peace for sitting as an examining court in a felony case. Article 1052 provides that the justice of the peace, in counties having a population of 20,000 or less, is allowed a fee of \$3.00 for services rendered in misdemeanor cases, and in counties having a population in excess of 20,000, the justice of the peace is allowed a fee of \$2.50. Therefore, in counties having a population of 20,000 or less, the justice of the peace shall receive a trial fee of \$3.00 for the holding of an examining trial, and in counties having a population in excess of 20,000, the justice of the peace is allowed a fee of \$2.50, and in addition thereto ten cents for each hundred words for writing down testimony "not to exceed \$3.00 for all his services in any one case."

It will not be necessary in the future for a justice of the peace to itemize his account, as heretofore required by Article 1066, Code of Criminal Procedure, and he will only be required to show on his account the itemization in reference to the testimony reduced to writing.

2.

QUESTION: Does the law authorize justices of the peace to accept statutory fees for examining trials where the examining trial has been waived by the defendant and not actually held?

This we answer in the affirmative.

Where a party charged with a felony waives the examining trial, the justice of the peace and sheriff or constable are entitled to the same fees as if a trial were had. Our discussion, however, will be limited to fees of the justice of the peace. We take the position that the justice of the peace is not allowed a separate fee for the holding of an examining trial, since this is only one of the several duties performed, when sitting as an examining court. Article 35, Code of Criminal Procedure, is the authority for the magistrate to sit for the purpose of inquiring into a criminal accusation against any person, and prescribes this as the examining court. Article 1020, Code of Criminal Procedure, provides for fees to the justice of the peace for sitting as an examining court and does not refer to or use the term "examining trial". The fee has been allowed to the justice of the peace for the several services that are actually rendered, such as the taking and filing of the complaint, issuing the warrant for arrest, issuing the subpoenas for witnesses, making of entries pertaining

thereto upon the docket of the court, preparing the transcript, and in addition thereto for the holding of an examining trial, if any be demanded, either by the State or the defendant, or at the instance of the magistrate himself. It would be unjust to hold that this official could be deprived of his fee simply because the examining trial was never held. The services performed in taking the complaint, issuing the warrant for arrest issuing subpoenas for witnesses, making the entries thereof upon the docket of the court, and preparing the transcript, is all that the law requires of him, providing the accused waives the examining trial and the State's Attorney does not insist upon same, and the justice enters an order binding the defendant to appear before the district court to await the action of the grand jury on said charge.

It must be remembered, however, that the fees authorized by this article cannot be allowed unless the defendant is indicted for the offense which he was charged with in the examining court.

3.

QUESTION: Can a justice of the peace, in a felony case, on his own motion and without any application, formal or otherwise, on the part of the defendant, proceed to hold an examining trial and collect fees therefor?

Article 299, Code of Criminal Procedure, expressly answers the question propounded in providing:

"The accused may waive an examining trial in any bailable case and consent for the magistrate to require bail of him; but the prosecutor or *magistrate* may examine the witnesses for the State as in other cases. The magistrate shall send to the proper clerk with the other proceedings in the case, a list of the witnesses for the State, their residence and whether examined."

In the case of *Porch v. State*, 51 Criminal Reports 7, 99 S. W. 1124, the court held this statute clearly authorized the examining court to proceed with the examination even if the defendant waived his right of trial.

4.

QUESTION: When is a justice of the peace entitled to receive his fee for services rendered in connection with an examining trial?

This question is specifically answered by the statute in paragraph 4, Article 1020 Code of Criminal Procedure, 1925, which reads as follows:

"The fees mentioned in this article shall become due and payable only after the indictment of the defendant for the offense for which he was charged in the examining court and upon his itemized account sworn to by the officers claiming such fees, approved by the judge of the district court."

5.

QUESTION: May the justice of the peace retain his fees in misdemeanor cases out of the trial fees collected by him?

This question has heretofore been answered in an opinion written

by Hon. Bruce W. Bryant, First Assistant Attorney General, and to quote from that opinion :

"This question is answered by the plain provisions of Article 1052, Code of Criminal Procedure, as amended by Chapter 55, Acts of the First Called Session, 41st Legislature, and Article 1074, Code of Criminal Procedure, as amended by Chapter 56, Acts of the First Called Session, 41st Legislature; also, Article 1077, Code of Criminal Procedure of 1925.

"This last article provides :

"A jury fee shall be collected as other costs in a case, and the officer collecting it shall forthwith pay it to the county treasurer of the county where the case was had'.

"Article 1074, as amended, provides for the collection of the trial fee by the justice of the peace, and further provides:

"The same to be collected and paid over in the same manner as in the case of a jury fee'.

"Article 1052, as amended, among other things, provides:

"Such Judge or Justice shall present to the Commissioners' Court of his county, at a regular term thereof, a written account specifying each criminal action in which he claims such fee, certified by such Judge or Justice to be correct, and filed with the County Clerk. The Commissioners' Court shall approve such account for such amount as they find to be correct, and order a draft to be issued by the County Treasurer, in favor of such Judge or Justice for the amount so approved'.

"These articles make it clear that a justice of the peace must remit his trial fees direct to the county treasurer, take his receipt therefor, submit his verified accounts for his fees to the commissioners court, who, in turn approves the same and orders the clerk to issue a warrant on the county treasurer for the amount of fees due him."

6.

QUESTION: When a trial fee is collected, what disposition is made of it by the justice of the peace?

Article 1074, Code of Criminal Procedure, as amended by Acts of the 41st Legislature, 1st Called Session, Chapter 56, page 156, provides for a trial fee in misdemeanor cases and reads in part, as follows:

"In each case of conviction in a county court or a county court at law, whether by a jury or by a court, there shall be taxed against the defendant or against all defendants where several are held jointly, a trial fee of \$5.00, the same to be collected and paid over in the same manner as in the case of a jury fee, and in the justice court the trial fee shall be the sum of \$4.00."

It will be noted that the article provides that the trial fee shall be collected and paid over in the same manner as in the case of a jury fee.

Article 1077, Code of Criminal Procedure, providing for the collection of a jury fee, reads as follows:

"A jury fee shall be collected as other costs in the case and the officer collecting it shall forthwith pay it to the county treasurer of the county where the conviction was had."

Therefore, the justice of the peace collecting a trial fee as authorized by Article 1074, as amended by acts of the 41st Legislature, 1st Called Session, Chapter 56, page 156 should immediately after col-

lecting same pay it over to the county treasurer of the county and take his receipt therefor, showing the style and number of the case and the amount thereof.

7.

QUESTION: Is a justice of the peace authorized by law to collect fees for himself from a defendant?

The justice of the peace has no authority to collect a fee for himself from a defendant as was previously authorized by Article 1066, Code of Criminal Procedure, said article having been repealed by the Acts of the 41st Legislature, 1st Called Session, Chapter 55, page 155.

8.

QUESTION Is the justice of the peace entitled by law to collect a trial fee from a defendant who has pleaded guilty, a jury having been waived?

This question is answered in the affirmative.

Such a fee is specifically authorized by Article 1074, as amended by the Acts of the 41st Legislature, 1st Called Session (Chapter 56, page 156), which article reads as follows:

"In each case of conviction in a county court, or a county court at law, whether by a jury or by a court, there shall be taxed against the defendant or against all defendants, when several are held jointly, a trial fee of Five Dollars, the same to be collected and paid over in the same manner as in the case of a jury fee, and in the justice court the trial fee shall be the sum of Four Dollars."

The fee collected is known as a trial fee, and should be paid over to the county treasurer of the county in the same manner as in the case of a jury fee.

9.

QUESTION: Is a justice of the peace entitled to a trial fee when the defendant is acquitted?

10.

QUESTION: If not so entitled in all cases, then under what circumstances is he entitled to such fees?

There can be no question but that a trial fee can only be collected from a defendant in case of a conviction, but regardless of the outcome of the case, conviction or acquittal, the justice of the peace is entitled to a fee provided the trial is actually held. The legislative intent is clearly shown in the concluding paragraph of Article 1052, as amended by Acts of the 41st Legislature, 1st Called Session, (Chapter 55, page 156) which reads:

"The fact that a justice of the peace is disqualified to try a misdemeanor case in which he charges fees against the defendant, and that there should be some fair way to compensate him, and that the fees to be paid under this amendment will be offset by a trial fee to be charged against each defendant convicted of a misdemeanor, creates an emergency . . ."

The purpose of this provision and the statute was twofold. First,

it was to allow the judge or justice of the peace his fee when a defendant was tried and acquitted; second, it was not to allow a fee to a judge or justice of the peace when no trial was actually had. We are speaking of misdemeanor cases. In other words, the Legislature contemplated that a case might arise where the court would call a case for trial and both the State and the defendant would announce ready for trial and proceed therewith, but the State would produce no evidence and the burden of proof being upon the State in all criminal cases to prove the defendant guilty, the court or jury would have to return a verdict of not guilty. In such a case the question might arise as to whether the judge or justice of the peace would be entitled to his fee. The Legislature has made it plain that no fee should be paid to these officers under such a statement of fact by inserting the following provision within Article 1052, as amended by Acts of the 41st Legislature, 1st Called Session, Chapter 55, page 155:

“. . . Such judge or justice shall present to the commissioners' court of his county at a regular term thereof, a written account specifying each criminal action in which he claims such fee, certified by such judge or justice to be correct, and filed with the county clerk. The commissioners' court shall approve such account for such amount as they find to be correct and order a draft to be issued upon the county treasurer in favor of the judge or justice for the amount so approved. Provided the commissioners' court shall not pay any account or trial fees *in any case tried and in which an acquittal is had*, unless the state of Texas was represented in the trial of said cause by the county attorney, or his assistant, criminal district attorney, or his assistant, *and the certificate of said attorney is attached to said account, certifying to the fact that said cause was tried and the State of Texas was represented, and that in his judgment there was sufficient evidence in said cause to demand a trial of same.*”

Thus, we see that a justice of the peace is entitled to his fee in case of an acquittal only where there has been an actual trial, and the State has been represented in the trial by the prosecuting attorney, and in addition thereto, where there is a certification on the part of the prosecuting attorney that in his judgment there was sufficient evidence to demand the trial which was held.

11.

QUESTION: Is a justice of the peace entitled to the fee provided for in Article 1052, as amended, when the case is dismissed?

It is evident from reading Article 1052, that it provides for payment of a fee to the justice of the peace “for each criminal action tried and finally disposed of before him”. Before this article was amended, it only applied to county judges, but contained exactly the same provision above quoted. In the case of *Brackenridge v. State*, 11 S. W. 630, it was held that a county judge was not entitled to the fee in a case dismissed without trial. There has been no material change in the article as it then existed that would now permit of a different conclusion than that announced by the court in the case above mentioned, therefore, in the light of this authority, a justice of the peace would not be entitled to the fee provided for in Article 1052, as amended, when a case is dismissed without trial.

12.

QUESTION: When several defendants are proceeded against jointly, in the justice court, is the magistrate entitled to fees for each defendant?

Article 1020, Code of Criminal Procedure, 1925, in reference to examining trials, reads as follows:

“Only one fee shall be allowed for an examining trial though more than one defendant is joined in the complaint. When defendants are proceeded against separately who could have been proceeded against jointly, but one fee shall be allowed in all cases that could have been so joined.”

Article 1074, as amended by Acts of the 41st Legislature, 1st Called Session, Chapter 56, page 156, has reference to fees in misdemeanor cases, and reads in part as follows:

“In each case of conviction in a county court or court at law, whether by a jury or by a court, there shall be taxed against the defendant, *or against all defendants when several are held jointly*, a trial fee of \$5.00 . . . and in the justice court the trial fee shall be the sum of \$4.00.”

The latter article authorizes the justice of the peace to collect a trial fee in the amount of \$4.00, and where there are several defendants proceeded against jointly this fee is taxed against all of the defendants. Where there are several defendants tried jointly, only one trial fee shall be taxed against them; but where they sever and are tried separately, a trial fee shall be taxed in each trial. This does not mean, however, that the justice of the peace is to receive, personally, a fee from all defendants, but he receives his compensation under Article 1052, Code of Criminal Procedure, as amended by Acts of the 41st Legislature, 1st Called Session, which allows him a fee “for each criminal action tried and finally disposed of before him”. In other words, a justice of the peace would not be entitled to a fee for each defendant when proceeded against jointly. This has reference to cases where several defendants are held jointly and does not apply to cases which have been joined or consolidated for the purpose of one hearing in order to expedite matters.

13.

QUESTION: Is a justice of the peace entitled to an additional \$1.50 for preparing a transcript where the case has been disposed of in the justice court and appeal perfected to the county court.

A justice of the peace in a criminal case is only entitled to a trial fee of \$2.50 or \$3.00, determined according to the population, as provided by Article 1052, as amended by Acts of the 41st Legislature, 1st Called Session, Chapter 55, page 156, in cases actually disposed of before him, and is not entitled to an additional fee of \$1.50 for making a transcript when an appeal is taken after conviction in a justice court.

14.

QUESTION: Is a justice of the peace entitled to a fee of \$2.50 in each case in which he sits as an examining court regardless of whether or not the grand jury returns a true bill?

15.

QUESTION: Is a justice of the peace entitled to a fee of fifty cents (50c) for taking the testimony in an examining trial as was heretofore customary?

The answers to the foregoing questions have probably been included in some of our answers to other questions propounded, but in view of the fact that they have been submitted separately by officials of Harris County, Texas, we will again point out the statutes which specifically answer them. Article 1020, Code of Criminal Procedure, is clear, explicit and unambiguous in its terms in providing that "the fees mentioned in this article shall become due and payable only after the indictment of the defendant for the offense for which he was charged in the examining court . . .", therefore, it is essential that the grand jury return a true bill in order to entitle a justice of the peace to receive the fee allowed by law. (Felony cases).

The justice of the peace sitting as an examining court in felony cases in counties having a population in excess of 20,000 is entitled to the \$2.50 allowed by Article 1052, as amended by the Acts of the 41st Legislature, 1st Called Session, Chapter 55, page 155, and in addition thereto ten cents (10c) for each one hundred words for writing down testimony, to be paid by the State, not to exceed \$3.00 for all services in any one case.

16.

QUESTION: Is a justice of the peace entitled to collect his fees in misdemeanor cases immediately where the defendant is found guilty but judgment of the court deferred until some other day, fixed by the order of the court?

Article 698, Code of Criminal Procedure, as amended by the Acts of the 42nd Legislature, Regular Session, Chapter 39, page 59, provides that a judgment in such cases may be deferred, and reads in part as follows:

"On each verdict of acquittal or conviction the proper judgment shall be entered immediately. If acquitted, the defendant shall be at once discharged from all further liability upon the charge for which he was tried; *provided, that, in misdemeanor cases where there is returned a verdict, where a plea of guilty is entered and the punishment assessed by a fine only, the court may on written request of the defendant, and for good cause shown, defer judgment until some other day fixed by the order of the court; but in no event shall the judgment be deferred for a longer period of time than six months. On expiration of the time fixed by the order of the court, the court or judge thereof shall enter judgment on the verdict of plea and the same shall be executed as provided by Chapter 4, Title 9, Code of Criminal Procedure of the State of Texas. . . .*"

It must be remembered that Article 1052, as amended by the Acts of the 41st Legislature, 1st Called Session, Chapter 55, page 155, provides a fee "for each criminal action tried and finally disposed of before him". The justice of the peace unquestionably has the authority to defer judgment in misdemeanor cases where the defendant is convicted or pleads guilty, but in those cases where the judgment is deferred as authorized by Article 698, Code of Criminal Procedure

as amended, he cannot under any circumstances collect his fees until the judgment has been entered, thereby completing the final act and disposing of the case. Since the fee is allowed in each criminal action tried and finally disposed of, it is necessary that every act be officially completed to the end of a final disposition. It cannot seriously be contended that the action has been disposed of as long as the judgment in the cause is deferred. We do not wish to be understood as holding that the fine assessed would have to be collected before the justice of the peace would be entitled to his fees, but the judgment would certainly have to be entered before the case would be considered finally disposed of before the court.

17.

QUESTION: Where two or more defendants are charged in separate complaints for burglary and in separate complaints for theft over \$50.00, growing out of the same transaction, and examining trial is held for each offense, how many fees are allowed the officer?

18.

QUESTION: If two or more defendants are charged in separate complaints for the same offense, growing out of the same transaction, and only one defendant is arrested and his examining trial is held, but later the other defendant, charged with the same offense, is arrested and examining trial is held, how many fees are allowed the officers?

Under the provisions of Article 1020, Code of Criminal Procedure, it is provided that when defendants are proceeded against separately who could have been proceeded against jointly, one fee should be allowed in all cases that could have been so joined. This article applies only to offenses growing out of the same transaction and does not apply to separate offenses.

For instance, two men may be principals in the commission of burglary or theft over \$50.00 from the one house that is burglarized. Under Texas laws the defendant cannot be charged in the same complaint with the offense of burglary and also theft.

As evidenced by Article 1020, Code of Criminal Procedure, it was intended that in the two cases of burglary only one fee should be allowed, and in the two cases of theft only one fee should be allowed, thereby allowing only two fees to the officers in such cases.

The general rule is that there will be as many fees allowed as there are separate offenses.

The second question presents a more difficult situation. That part of Article 1020, C. C. P., heretofore referred to, reads as follows:

“When defendants are proceeded against jointly, but one fee shall be allowed in all cases that could have been so joined.”

It is our construction of this provision that where two or more persons commit an offense of the grade of felony, they should be jointly charged (“proceeded against”) in the same complaint. However, should each be proceeded against separately, when they could have been proceeded against jointly, and separate trials are had and they

are subsequently indicted for the offense with which they stood charged before the magistrate, but one fee may be collected from the State by the officers mentioned in Article 1020 for both trials.

Now, there may be instances where the officer who files the complaint has only evidence which would justify him in filing a complaint against one person but subsequently secures evidence which justifies him to file a complaint against another. In such an event, it might be said that the defendants could not have been proceeded against jointly.

It necessarily follows that no hard and fast rule can be made which would govern in every case. Each case must be governed by the particular facts of that case. The statute itself lays down the general rule, which is in effect that all defendants must be proceeded against jointly, where it can be done. The officers should, in each instance where separate complaints are filed and separate fees are sought to be collected when presenting their respective accounts for approval to the district judge, explain to him fully the circumstances upon which they rely to collect the fees. It is the duty of the district judge to ascertain the facts and circumstances which will enable him to certify, as a fact, that the defendants could not have been proceeded against jointly. This he must do under the provisions of Article 1020.

In this connection, it might not be amiss to call attention to Articles 365, 366 and 367, of the Penal Code, pertaining to the offense of extortion. In these articles the offenses of demanding and collecting by officers of fees not authorized by law are clearly defined and the punishment prescribed.

19.

QUESTION: Does Article 1055, Code of Criminal Procedure, 1925, providing half costs shall be paid officers, apply to fees due the justice of the peace in misdemeanor cases where the defendant has satisfied fine and cost by laying in jail?

In view of Article 1052, as amended, allowing fees to the justice of the peace in misdemeanor cases for each action tried and disposed of, we answer this question in the negative. Article 1055, Code of Criminal Procedure, 1925, is not applicable to fees due the justice of the peace for the reason that fees authorized to be paid the magistrate under the terms of Article 1052, accrue immediately upon the disposition of the case by trial. It is immaterial to the justice of the peace's right to collect said fees whether the penalty imposed is ever collected or not.

20.

QUESTION: Is a justice of the peace entitled to his fee in a misdemeanor case where the trial is actually held, defendant convicted, but an appeal is taken from his court?

We have repeatedly stated herein that the justice of the peace receives his fee in misdemeanor cases "for each criminal action tried and finally disposed of before him". This official is no longer interested in the final outcome of a case and where a defendant has been

actually tried and judgment of the court entered, he is certainly entitled to the fee authorized by Article 1052, Code of Criminal Procedure, and the fact that an appeal is taken from his court is immaterial and can have no bearing on the question as to his right to collect his fees for the services rendered in connection with the trial had in his court.

21.

QUESTION: Is a justice of the peace entitled to a commission for collecting fines for the county and remitting same to the county treasurer?

There is no statute which authorizes the payment of such commission, but on the other hand Article 951, Code of Criminal Procedure, as amended by Acts of the 41st Legislature, (Chap. 105, page 240) expressly prohibits the retention of a commission by the justice of the peace and reads as follows:

“The sheriff or other officer, except a justice of the peace, or his clerk, who collects money for the state or county, under any provision of this Code, except jury fees, shall be entitled to retain 5% thereof when collected.”

In this connection, see the case of McLennan County v. Boggess, 139 S. W. 1054.

Article 950, Code of Criminal Procedure, 1925, provides for a collection of 10% by county and district attorneys for all fines and forfeitures collected for the state or county; and further provides that the clerk of the court in which the judgment is rendered shall be entitled to 5% of the amount of said judgment. Prior to the amendment of Article 951, Code of Criminal Procedure, this department held “a justice of the peace is not clerk of his own court, and therefore is not entitled to a commission of 5% on fines collected by him as such. (Attorney General’s opinion, Jan. 15, 1915, 42 Op Atty. Gen. 4).

We have tried to answer herein the many questions that have been received by this department and trust that this opinion will be of some benefit to the justices of the peace of this state.

Yours very truly,

EVERETT F. JOHNSON,

Assistant Attorney General.

Op. No. 2878

1. **STATUTE CONSTRUED:** Articles 1020, 1029 and 1030, C. C. P., dealing with fees of sheriffs for serving process in examining courts and for executing warrants of arrest and capiases construed.

2. **FEEES:** The maximum amount of fees, including mileage for executing warrant of arrest, a sheriff may collect for all services rendered by him in connection with an examining court in a felony case, is \$4.00.

3. **PROCESS:** A warrant of arrest issued by Justice of Peace, or other magistrate, before indictment, for purpose of having accused brought before such magistrate for examining trial, held to be a part of the “pro-

cess" of an examining court, for the execution of which sheriff cannot receive more than the maximum of \$4.00 provided by Art. 1020 C. C. P.

4. STATUTORY CONSTRUCTION: Rule that construction placed upon statute by Department of Government should control, applies only in event of ambiguity and doubtful construction—not where statute is clear and unambiguous.

5. STATUTORY CONSTRUCTION: Statutes prescribing fees for public officers are strictly construed and fees by implication are not permitted.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, November 2, 1931.

Hon. George H. Sheppard, Comptroller, Public Accounts, Austin, Texas.

DEAR SIR: In 1922 one of your predecessors in office submitted to W. A. Keeling, Attorney General of Texas, the following inquiry:

"Where a complaint is filed against a defendant charging a felony and a warrant is issued by the Justice of the Peace for his arrest and the sheriff has him arrested in some other county and goes after him and brings him back on said warrant to the county in which the complaint is filed and the defendant is bound over to await the action of the grand jury and the first grand jury thereafter returns a bill of indictment against the defendant for the very offense charged in the complaint, would the sheriff be allowed his mileage and transportation for himself and defendant, and if so what form of fee bill should the same be presented with?"

Under date of November 17, 1922, in a conference opinion approved by Attorney General Keeling and appearing at page 413 of the published reports of the Attorney General, 1922-1924, it was held that the fee of \$4.00 allowed a sheriff under what is now Article 1020, C. C. P., for serving process and attending an examining court in the examination of any felony case, was the maximum which such officers might receive for services rendered in connection with any one case in examining trials, "including making arrests, mileage in going to place of arrest, and 'conveying or removing prisoners', serving subpoenas, attending court, and all other services of whatsoever nature." In other words, the Attorney General's Department at that time held that, in the case stated, where a sheriff made an out of county arrest upon a warrant issued by a justice of the peace, or other magistrate, in a felony case and brought the accused before the magistrate issuing the warrant, and where the grand jury afterward indicted the accused for the offense charged in the complaint, the sheriff would not be entitled to collect for mileage traveled in the execution of such warrant of arrest, under Arts. 1029 or 1030 C. C. P., but could only collect mileage under Art. 1065, C. C. P., and in no event could he collect mileage and fees in excess of \$4.00 in any one case.

Under the administration of Attorney General Claude Pollard, the identical question was again submitted to the Attorney General's Department by Honorable S. H. Terrell, Comptroller of Public Accounts. On May 19th, 1927, an opinion was rendered by Assistant Attorney General H. Grady Chandler, in which he held that sheriffs and constables were not entitled to collect for mileage traveled in the execution of warrants of arrest issued by the justice of the peace, or other magistrate, in a felony case, under Arts. 1029 and 1030.

Copies of each of these opinions are attached hereto for your information.

Notwithstanding these opinions of the Attorney General's Department, the accounts of sheriffs have been approved by various district judges and allowed by the Comptroller, in which they made claim, and collected (under Arts. 1029 and 1030) for mileage traveled upon warrants issued by the justice of the peace, or other magistrate, in felony cases and in which arrests were made in counties outside the one where the charge was pending and the accused brought before such magistrate to be dealt with in the manner provided by law. This practice seems to have been carried on generally by practically all of the sheriffs for many years and seems to have been recognized by the Comptroller's Department.

In the spring of 1931, Honorable Moore Lynn, State Auditor and Efficiency Expert, in checking over the records of your department and the accounts of various sheriffs, learned that they were being allowed to collect (under Arts. 1029 and 1030) for mileage traveled in the execution of the magistrate warrants in felony cases before indictment. At about that time, Mr. Lynn also discovered in his files copies of the former opinions of the Attorney General rendered in 1922 and 1927, respectively. He immediately communicated with the First Assistant Attorney General under the present administration and inquired whether said opinions correctly construed the statutes relating to such charges for such mileage. Said Assistant at that time stated that, in his opinion, the law had not been altered and called to the attention of the State Auditor an opinion rendered in 1928 by the Texarkana Court of Civil Appeals in the case of McDaniel vs. State, 9 S. W. (2d) 478. In that case the sheriff of Delta County was removed from office for misconduct, involving, among other things, unlawful charges for mileage traveled in the execution of warrants issued by the justice of the peace in felony cases before indictment.

Acting upon this information furnished to the State Auditor, your department immediately refused to allow sheriffs and constables to collect for mileage traveled in the execution of justice court warrants before indictment.

After your refusal to allow such charges, these rulings were challenged by the Sheriff's Association through their counsel, the Honorable T. H. McGregor. They have insisted that the opinions of the department heretofore rendered were unsound and not the law. At the earnest insistence of Senator McGregor and because of the importance of the questions involved, I called several of the Assistants in this Department together for a consultation upon the question, at which counsel for the Sheriff's Association was present and very ably presented their cause. We are indebted to him for his able and analytical presentation of the matter.

Counsel contends that the previous opinions of the Attorney General's Department were ex parte and did not go fully into the questions involved; that the determination of these questions involve the very enforcement of the criminal laws of this State, and, if decided adversely to their contentions, would precipitate a condition of chaos

in the enforcement of such laws and leave the people of Texas at the mercy of the criminal element. He also urges that, to sustain the previous constructions placed by this Department upon the question of mileage collected by sheriffs, would overturn a rule in these matters which has been followed by all officers and courts for more than ninety years.

While a proper decision of the matters herein involved requires a detailed discussion of numerous statutes, reported cases and rules of construction, yet, the question finally presented is whether sheriffs and constables are entitled to be paid for mileage under subdivisions 1 and 4 of Articles 1029 and 1030, C. C. P., respectively, or under the second paragraph of Article 1020, C. C. P.

The pertinent portions of said Sections 1 and 4, respectively, of Article 1029, C. C. P., read as follows:

"* * * The sheriff and constable shall receive the following fees:

"1. For executing each warrant of arrest or *capias*, for making arrest without warrant when so authorized by law, the sum of \$1.00, and in all cases five cents per mile for each mile actually and necessarily traveled in going to the place of arrest; and for conveying each prisoner to jail, he shall receive the mileage provided in subdivision 4."

"4. For removing or conveying prisoners, for each mile going and coming, including guard and all other necessary expenses, when traveling by railroad, ten cents. When traveling otherwise than by railroad, fourteen cents; provided that where more than one prisoner is so conveyed or removed at the same time, in addition to the foregoing, he shall be allowed eight cents per mile for each additional prisoner."

Article 1030, C. C. P., is practically the same as Article 1029, the chief distinction being that the former is applicable to a county where less than 3,000 votes have been cast at the preceding presidential election, and the latter is applicable to a county where 3,000 votes or more have been cast at such preceding presidential election. In common parlance among the sheriffs and in the Comptroller's Department, Article 1029, C. C. P. is said to be applicable to an "over county", while Article 1030 is said to be applicable to an "under county".

That the fees, as provided in each of said articles, are to be allowed only in *felony* cases tried in the district court is disclosed by Article 1033, C. C. P., the pertinent part of which reads as follows:

"Before the close of each term of the district court, the district or county attorney, sheriff and clerk or said court shall each make out a bill of the costs claimed to be due them by the State, respectively, *in the felony cases tried at that term.*"

It will be noted that the bill is for costs "claimed" and is only to be made out "in felony cases tried at that term". Article 1033 then prescribes the various requisites of the bill of costs.

Article 1034 provides for the presenting of this cost bill to the district court and what the court is to do with it, and what the clerk shall do.

The pertinent portion of Article 1020, C. C. P., relating to fees in examining court reads as follows:

"Sheriffs and constables serving process and attending any examining court in the examination of any felony case shall be entitled to such fees

as are fixed by law for similar services in misdemeanor cases to be paid by the State, not to exceed \$4.00 in any one case. * * *.

"The fees mentioned in this article shall become due and payable only after the indictment of the defendant for the offense for which he was charged in the examining court and upon an itemized account sworn to by the officers claiming such fees approved by the judge of the district court."

In the opinions of the Attorney General's Department of 1922 and 1927, respectively, warrants of arrest issued by a justice of the peace, or other magistrate, in felony cases before indictment were treated as a part of the "process" of an examining court, and, therefore, the sum of \$4.00, as provided in Article 1020, supra, was held to be the maximum which might be collected by sheriffs for all services rendered in connection with "serving process and attending any examining court". It is contended by counsel for the sheriff's Association that the department erred in treating the warrant of arrest issued by a magistrate as a part of the "process" of an examining court. The proposition is advanced that, in issuing a warrant of arrest, the justice of the peace, or other magistrate, acts in the capacity of a magistrate but not as an examining court.

It is true that the justice of the peace has been clothed with varied duties and powers. He may act not only as a justice of the peace, as that term is ordinarily understood, but as a magistrate, coroner, and notary public. In sitting as an examining court, the justice of the peace acts in the capacity of a magistrate holding such examining court.

Article 35, C. C. P., cited by counsel, reads:

"When the magistrate sits for the purpose of inquiring into a criminal accusation against any person, this is called an examining court."

We do not believe that this Article should be so literally construed as to hold that a justice of the peace, or other magistrate, can not issue valid process as an examining court until he actually performs the physical act of sitting down for the purpose of immediately and then and there inquiring into a criminal accusation against some person. As a necessary requisite to an examining court, the accused person must be before the court. Generally he is brought there by virtue of "process" issued by the magistrate.

Let us briefly review the procedure leading up to an examining trial. A criminal cause, before indictment, is generally initiated by the filing of a complaint, before the district or county attorney, to the effect that an offense has been committed. The complaint is then reduced to writing, signed and sworn to by the complainant, and attested by the county or district attorney, and filed with a magistrate.

Article 29, C. C. P. provides as follows:

"If the offense be a misdemeanor, the attorney shall forthwith prepare an information based upon such complaint and file the same in the court having jurisdiction. If the offense be a *felony*, he shall forthwith file the complaint with a *magistrate* of the county."

Article 33, C. C. P. says who are magistrates and is as follows:

"Each of the following officers is a 'magistrate' within the meaning of this Code: The Judges of the Supreme Court, the Judges of the Court of Criminal Appeals, the Judges of the district court, the county judge, any county commissioner, the justices of the peace, the mayor or recorder of an incorporated city or town."

Article 34 prescribes the duties of a magistrate, and authorizes him, among other things, "to issue all process intended to aid in preventing and suppressing crime; to cause the arrest of offenders by the use of lawful means in order that they may be brought to punishment."

Magistrates are authorized to issue warrants of arrest in the following cases:

"1. In any case in which they are by law authorized to order verbally the arrest of any offender.

"2. When any person shall make oath before such magistrate that another has committed some offense against the laws of the State.

"3. In any case named in this Code where they are specially authorized to issue such warrants."

A "warrant of arrest" is defined by Article 218 C. C. P., as follows:

"A "warrant of arrest" is a written order from a magistrate, directed to a peace officer or some other person specially named, commanding him to take the body of the person accused of an offense, to be dealt with according to law."

Although commonly, even among lawyers, the term "warrant of arrest" and "capias" are used interchangeably, there is quite a difference in the statutory definition of each. Article 441, C. C. P., defines a "capias" as follows:

"A 'capias' is a writ issued by the court, or clerk, and directed 'To any sheriff of the State of Texas,' commanding him to arrest a person accused of an offense and bring him before that court forthwith, or on a day or at a term stated in the writ."

It is provided in Article 233, C. C. P., that the officer, or person executing a warrant of arrest, shall take the person whom he is directed to arrest forthwith before the *magistrate who issued the warrant*, or before the magistrate named in the warrant. Article 234 provides that one arrested in one county for *felony* committed in another shall in all cases be taken before some magistrate of the county where it was alleged the offense was committed.

In the question before us, we are dealing only with *felony* cases. It will not be necessary to take note of the articles dealing with arrest and the procedure in misdemeanor cases, since the question for determination by this department deals only with fees in felony cases.

In determining whether a warrant of arrest issued by a justice of the peace, or other magistrate, is a part of the "process" of an examining court, the question presents itself—What is the purpose of the magistrate in issuing such warrant of arrest? Necessarily, the warrant is issued for the purpose of having the accused brought before the magistrate "to be dealt with according to law." And how shall

he be dealt with? The answer is found in Article 245, C. C. P., reading as follows:

“When the accused has been brought before a magistrate, that officer shall proceed to examine into the truth of the accusation made, allowing the accused, however, sufficient time to procure counsel.”

Clearly, we think, the purpose of the issuance of a warrant of arrest by a magistrate after complaint has been filed is to have the accused brought before such magistrate for the purpose of conducting an examining trial by examining “into the truth of the accusation made”. It would be a strained construction, we believe, to hold that such warrant of arrest was not a part of the “process” of an examining court; and that in executing such “process” the sheriff was not “serving process” of such examining court.

Counsel cites the case of *Brown vs. State*, 55 Tex. Cr. App. 572, 113 SW 139, in support of his assertion that the execution of warrant of arrest issued by a magistrate is not a part of the “process” of an examining court. It is true that in the opinion in this case, and on page 144, Judge Davidson, after quoting Article 25, Pen. Code 1890, defining the word “accused” says:

“So it would seem from this that a defendant is not accused until he has been charged with an offense, and he can not be tried until he has been arrested, and therefore a magistrate can not sit as an examining court, or conduct an examining trial, until he has the party under arrest and before him.”

The writer has the greatest respect for the opinions of this eminent jurist, but is compelled to observe that the above quoted statement is clearly and unmistakably “dictum”. Brown had been convicted, in the district court of Fannin County, for perjury in his testimony in an examining trial before the Justice of the Peace, acting as such. The Justice of the Peace, of precinct No. 3, of Fannin County, had gone into precinct No. 4 of said county, and there held a court of inquiry—not an “examining court.” The question presented to the Court of Criminal Appeals was whether perjury could be assigned upon Brown’s testimony before the Justice of the Peace of precinct No. 3, holding a court of inquiry in precinct No. 4. The court very properly decided the Justice of the Peace, holding the court of inquiry, was without authority to conduct same outside his own precinct.

Judge Davidson himself recognized that his statement, to the effect “that a magistrate can not sit as an examining court, or conduct an examining trial, until he was the party under arrest and before him”, was “dictum”. Before making such statement, and before discussing the question of the Justice of the Peace sitting as an examining court at all, Judge Davidson said, on page 142:

“We have only been discussing the authority of a justice of the peace as such, and acting in the capacity of justice of the peace holding courts of inquiry under Article 941, Code Cr. Proc.; but such officer is presented in another light which we have not been discussing. *But the matter is not involved in this case, if at all, in an indirect or negative way, but will notice it, as it may be so involved.*”

In any event, however, the simple statement that "a Magistrate can not sit as an examining court, or conduct an examining trial, until he has the party under arrest and before him," can not be construed as holding, even inferentially, that a warrant of arrest, issued by the Magistrate, for the purpose of having the accused brought before him, in order that the truth of the accusation might be inquired into, is not a part of the "process" of an examining court. If the literal and strained construction contended for by counsel should prevail, then a magistrate would have no authority even to issue "process" for witnesses, until the accused had been arrested and actually brought before him, and until he had performed some such physical act as sitting down, opening his docket book, and announcing that an examining court was then in session. If the magistrate were thus compelled to delay the issuance of subpoenas for witnesses, it would hamper the administration of justice in a manner clearly not intended by the Legislature.

Counsel for the Sheriffs' Association makes the claim that, for many years, such officers have been demanding in their accounts, judges have been approving, and the Comptroller has been allowing, fees for mileage traveled in the execution of warrants of arrest issued by magistrates before indictment and before examining trials. He invokes the well known rule that the construction thus placed upon these statutes by a state department should prevail. It is the understanding of the writer that this contention, as to the collection of such fees, is, to a large extent, true. We have been informed by the State Auditor, however, that it is not universally so and that, in recent years, many of the sheriffs adopted the practice of making out their returns upon *capias* issued after indictment, showing that they had arrested the accused and traveled the distance for which mileage was claimed under such *capias*; when, in fact, the arrests had been made and the distance traveled under and by virtue of magistrates' warrants of arrest. The Auditor states, and the writer has been informed, by at least one sheriff who has made his claims and collected for such mileage, that they were informed by the Secretary of the Sheriff's Association, (who was, at the same time, and has been for a number of years, the auditor in the Comptroller's Department, by whom such accounts were approved), that this manner of making claims and collecting for mileage was lawful and proper.

Upon these facts we do not attempt to pass; but the rule of construction contended for applies only in the event of an ambiguity, or doubtful construction—not where the statute is clear and unambiguous. *Galveston H. & S. A. Ry. Co. v. State*, 81 Tex. 572, 17 SW 67.

Moreover, we think this rule of contemporaneous or departmental construction, invoked by counsel, is more offset by one equally well recognized in this state, to the effect that statute prescribing fees for public officers are strictly construed; and that fees by implication are not permitted. This rule has been recognized by the Commission of Appeals of the Supreme Court in *McCally vs. City of Rockdale*, 246 SW 654. In that case the court said:

"This is true notwithstanding such officer may be required by law to perform specific services for which no compensation is provided. The obligation to perform such services is imposed as an incident to the office, and the officer is deemed to have engaged to perform them without compensation by his acceptance thereof. *McLennan County v. Bogges*, 104 Tex. 311, 315, 316, 137 SW 246, *State vs. Moore*, 57 Tex. 307, 320, 321; *Hallman vs. Campbell*, 57 Tex. 54.

In any event, upon the specific question involved herein, we think the case of *McDaniel vs. State*, 9 SW (2d) 478, is controlling. The opinion in that case was written by Mr. Justice Hodges, and rehearing denied July 5, 1928. A writ of error was thereafter refused by the Supreme Court.

Counsel for the Sheriffs' Association insists, however, that the *McDaniel* case is not in point. We believe it is, and that the opinion of the Court of Civil Appeals is binding upon the Attorney General's Department until it is overruled by the Supreme Court. It may be well to call attention to each part of the opinion shedding any light upon the question as to whether the collection of mileage or warrants of arrest, issued by justice of the peace before indictment, was lawful. Quoting from the opinion:

"The amended petition, on which the case was tried alleges, in substance, that, in making out his accounts against the state for fees in felony cases, the appellant charged and collected mileage on *warrants* and other writs where no mileage was due, and collected excessive mileage where mileage was due"

Omitting its formal parts, the charge of the court upon the issues to be considered in this opinion is as follows:

"(You are further instructed that, when a sheriff holds a warrant for the arrest of an accused, issued upon an indictment found against the party accused, and when the sheriff has arrested the person under such warrant, that he is not entitled to include in his account for services rendered in said case fees for arrest, or for bond taken or mileage incurred under warrant or other process issued out of a justice court for or against the accused prior to the indictment of the party. . . .

"If making out his account for payment the defendant placed in his account claims for services performed prior to the date of the indictment, against the same person, and caused payment to be made for such services, then such fees were unlawfully made and collected;"

"The accounts upon which the charges of official misconduct are based are for services rendered in the district court *after indictments* had been returned against the defendants in the cases. Nowhere in the accounts is there any claim made for services rendered in examining trials before magistrates. . . .

"In the course of his charge the court instructed the jury that the appellant had no right to include in his accounts mileage traveled in executing warrants issued by magistrates in examining trials. The giving of that charge is assigned as error. The statute regulating sheriffs' fees in examining trials is found in Article 1020 of the Code of Criminal Procedure. It provides that sheriffs and constables serving process and attending magistrates' courts in the examination of any felony case shall be entitled to such fees as are fixed by law for similar services in misdemeanor cases, to be paid by the state, not to exceed \$4.00 in any one case. The appellant did not present any claim in these accounts for services rendered in justice courts, but he did in a number of cases charge for the miles he traveled in executing warrants issued out of justice courts in examining trials.

He testified that when arrests were made in Cooper, the county site, upon warrants issued after indictment of defendants, he charged in his account \$3.00 for executing those warrants and *for the miles he had traveled in executing other warrants which had been issued out of the justice courts.* That such charges against the state are unauthorized by the statute is too plain for argument. It is equally clear that, if they are unauthorized by some statutory provision, they can not be legally collected from the state. The fact that a custom of charging such mileage has been adopted and followed by the sheriffs of other counties may tend to disprove any evil intent on the part of the appellant in placing those items in his accounts, *but the custom does not alter the law."*

In asserting that the charge of the court in the McDaniels case, and the portions of the opinion quoted, are "dicta" counsel relies chiefly upon the quoted statement from the opinion, "Nowhere in the accounts is there any claim made for services rendered in examining trials before magistrates." We think this statement, taken in connection with the opinion as a whole, merely means that McDaniel made no claim for the \$4.00 fee in examining courts, provided under Article 1020, C. C. P. The remainder of the opinion, quoted above, shows clearly and conclusively that he did make claim and collect *for mileage traveled in the execution of warrants issued by the justice of the peace before indictment.* In fact, on page 482, Mr. Justice Hodges, in reviewing some of the testimony, and in giving instances of the character of charges made, calls attention to accounts, in four cases against two different defendants, in which it was claimed that McDaniel had arrested the defendants in Dallas on two different occasions. McDaniel's testimony in this connection is quoted as follows:

"I never have arrested Carroll Massey on the grand jury indictments; *he was arrested on a justice warrant.* . . ."

We do not know whether Mr Justice Hodges, in writing his opinion, had access to the opinions of the Attorney General's Department of 1922 and 1927, respectively, but it is clear from the opinion that he placed the same construction on warrants of arrest issued by magistrates before indictment, and treated such warrants as a part of the "process" of an examining court. This but further evidences the fact that such construction is a very natural one by force of common sense and reason.

After the decision of the Court of Civil Appeals at Texarkana in the McDaniel case in 1928, a writ of error was refused by the Supreme Court in *January, 1929.*

According to records in the Secretary of State's office this opinion was evidently recognized as being law, since a bill was introduced and passed in both Houses of the 41st Legislature in *January, 1929,* which, by its terms, corrected the inequities now complained of by the sheriffs. This bill, known as Senate Bill 31, amended Article 1020, C. C. P., so as to provide that in cases where an examining trial was held charging the offense of murder, rape, burglary, burglary of a private residence, theft of property of the value of \$50.00 or over, and the defendant was thereafter indicted by the grand jury, then the examining trial fee of the sheriff should be the same as provided

in Articles 1029 and 1030, C. C. P., for executing process. The emergency clause of this bill recited in part that:

“The fact that in many instances sheriffs are inadequately compensated for services rendered before indictment, creates a public necessity requiring the suspension of the constitutional rule which requires all bills to be read in each House on three several days.”

After the passage of Senate Bill 31 by both Houses, it was vetoed by Governor Dan Moody. The veto message, which is found at page 980 of the Senate Journal, Regular Session of the 41st Legislature, 1929, is significant. It reads in part as follows:

“My reason for vetoing this bill is the amount of expense which it would place upon the State. You would have to practically double your appropriation for the payment of fees of sheriffs and constables in felony cases. All of the process, or practically all of it, served out of the examining court would be duplicated in the district court.

“I believe that a bill can be drawn which would give the sheriffs or constables a fair compensation for the service of process out of the examining court, which would not involve the State having to pay for the same work a second time when process is issued out of the district court after indictment. If the State is going to pay the same fees for service of process out of an examining court as are paid for the service of process out of the district court, it seems to me that some provision should be made for taking the recognizance and bail bond of witnesses and the laws should be strengthened for placing the defendant, when bound over to await the action of the grand jury, under some more effective character of bail or recognizance bond and would obviate the necessity of the sheriff having to arrest him again after indictment.

“I know that the nominal fee of three or four dollars which is paid the sheriff in an examining trial is inadequate to meet his expense, but I believe that this bill would increase the expense beyond what is reasonable, and that in practically every case the State would have to pay twice for the arrest of the defendant and twice for the summoning of the witnesses, and in addition thereto considerably by way of mileage.

“For this reason I have vetoed this bill, and return it herewith.”

In spite of the veto of this bill by Governor Moody, and notwithstanding the opinion of the Court of Civil Appeals at Texarkana, and the opinions of the Attorney General's Department, some of the sheriffs have continued to claim and collect (under Arts. 1029 and 1030) for mileage traveled in executing these magistrate warrants.

The earnest plea of counsel for the Sheriff's Association that an adverse decision of this question would precipitate a condition of chaos in the enforcement of the criminal laws, and leave the people of Texas at the mercy of the criminal element, is very appealing. It is probable that the failure of the Legislature to provide for adequate compensation for sheriffs in executing felony warrants before indictment is unjust and inequitable. Like the courts, however, the Attorney General's Department can only construe the law as it is written. We are not privileged to declare what the law, perhaps, should be. We are responsible for the failure of the Legislature to provide for payment of mileage traveled by sheriffs in executing magistrate warrants before indictment. It may be that the Legislature has been influenced by the fact that, as is a matter of common

knowledge, some of the sheriffs have abused the public treasury by the collection of unlawful fees.

The statement has been made to the writer that unless the Attorney General's Department reverses the opinion of our predecessors in office, then the sheriffs will refuse to go to other counties and execute warrants of arrest because they know they can not be paid a greater fee than \$4.00 under the present law. Considerations of this kind can not be allowed to influence our consideration of this question, which has already been settled by decisions of the higher courts of this state. If it be true, however, that in cases of murder, burglary, rape, or robbery, a sheriff of this state will refuse to perform his sworn duty because he deems that the state has not provided an adequate fee for the performance of that particular service, then it is but another indictment of the fee system and the caliber of officers it has produced.

Abraham Lincoln declared that the best way to secure the repeal of a bad law was to observe it and that, by the observance, its evil result would be disclosed and soon rectified. We respectfully suggest to the honest and well intentioned sheriffs of this state that they can best appeal to the members of the Legislature to rectify these inequities, if such they be, by performing their sworn duties in this emergency. Thereby they may present to the Legislature concrete evidence of the truth of their contentions, and, we have no doubt, secure proper provision for payment of fees commensurate with the services performed.

Respectfully,

J. V. ALLRED,

Attorney General of Texas.

Op. No. 2900

CONSTITUTIONAL LAW—PUBLIC OFFICERS—REDUCTION OF COMPENSATION AND FEES—LEGISLATURE

1. The Legislature has full authority to alter, change or diminish the salary of any officer whose salary, fees or compensation is fixed by statute, whether the office itself be created by the statutes or by the constitution.

2. Where the office is created by the constitution and the salary is fixed by statute, the Legislature cannot reduce the salary to such an extent that the reduction would have the practical effect of abolishing the office.

3. Article 3, Section 40 of the State constitution prohibits the Legislature in special session from considering subjects other than those designated in the proclamation of the Governor.

4. If in special session legislation is enacted which is not submitted by the Governor and he later approves and files the enacted bill in the office of the Secretary of State, it is valid. *Jackson vs. Walker*, 49 S. W. (2d) 693.

OFFICES OF THE ATTORNEY GENERAL,

AUSTIN, TEXAS, October 5, 1932.

Hon. J. W. E. H. Beck, Chairman, Senate Investigating Committee, Austin, Texas.

DEAR SIR: Your letter of September 22nd addressed to Attorney General Allred has been received. Your letter reads:

"Please advise this committee if there is any constitutional inhibition that would prevent the Legislature of Texas, in regular or special

session, from reducing the salary of any statutory officer during his term of office in this state.

"This information is desired in order that we may proceed to prepare a general fee bill reducing the salaries of various officials.

"If there should be any particular office, the salary of which could not be changed, please list the office."

I assume that by the term 'statutory officer' as used in your letter you mean an officer holding an office created by statute, or an officer holding an office, the emoluments or compensation of which is fixed by statute, although the office itself may have been provided for in the constitution. Therefore the question presented by your letter may be restated as follows. to-wit:

First. Is it within the power of the Legislature to reduce, during his term of office, the salary or fees of an officer whose office is created by statute?

Second. If the office is created by the constitution, but the salary or fees incident thereto are fixed by statute, does the Legislature have authority to reduce the salary or compensation during the term of the officer?

In connection with the foregoing questions, we must first consider the nature of the relationship between the government and a person holding office under it. Under the common law in England a public office was considered an incorporeal hereditament grantable by the Crown as a source of all power, and certain public offices were actually inheritable, but in the United States public offices have never been regarded as property nor as having the character or qualities of grants. In the United States there is no such thing as a vested interest or an estate in an office, or even an absolute right to hold office. A public office is more of a public trust, and although emoluments may attach as an incident of office to enable the officer better to perform his duties, the office itself is created in the interest of and for the benefit of the public. An appointment or election to a public office does not establish a contractual relationship between the person appointed or elected and the public, so as to fall within constitutional restrictions against legislative impairment of contracts. See R. C. L., Vol. 22, pp. 376-379; 46 C. J. 932.

In *Throop on Public Officers*, Section 19, this doctrine is laid down as follows:

"It is therefore well settled in the United States that an office is not regarded as held under a grant or a contract, within the general constitutional provisions protecting contracts; but, unless the constitution otherwise expressly provides, the Legislature has power to increase or vary the duties or diminish the salary of other compensation appurtenant to the office or abolish any of its rights or privileges, before the end of the term, or to alter or abridge the term, or to abolish the office itself."

Among the numerous cases cited in support of this proposition is the case of *Jones vs. Shaw*, 15 Tex. 577.

The authorities are legion to the effect that in the absence of a constitutional prohibition the Legislature may change the compensation of those then in office, as well as future incumbents. 23 Am. &

Eng. Enc. of Law 401; 22 R. C. L. 432; 46 C. J. 1020, and authorities cited.

With reference to offices created by the Legislature, there is no provision in our constitution, express or implied, which prohibits the Legislature from increasing or diminishing the compensation incident to such offices during the term of any incumbent in so far as services to be rendered during the remainder of the term of such incumbent are concerned.

The doctrine to the effect that in the absence of a constitutional limitation the Legislature has power to diminish the salaries or fees incident to offices of its own creation, is sustained in the Texas cases discussed hereunder. In *Cowell vs. Ayres*, 110 Tex. 348, 220 S.W.

764, in passing on an act of the Legislature creating the Board of Control and abolishing the board of managers of lunatic asylums, the court, after deciding that the board of managers of lunatic asylums was a statutory office, said:

“Interference with statutory terms of present incumbents furnishes no obstacle to the exercise of the power of the Legislature to abolish offices of its own creation. As declared by Judge Cooley in the case of the City of Wyandotte vs. Drennan, 46 Mich. 476, 9 N. W. 500, ‘offices are created for the public good at the will of the legislative power, with such powers, privileges and enactments attached as are believed to be necessary or important to make them accomplish the purposes designed. But as except as it may be sustained (restrained) by the constitution, the Legislature has the same inherent authority to modify or abolish that it has to create; and it will exercise it with a like consideration in view.’”

See also *Stanfield vs. State*, 83 Tex. 317; 18 S. W. 577; *City of Palestine vs. West* (Civ. App.) 37 S. W. 783; *Carver vs. Wheeler County* (Civ. App.) 208 S. W. 537; and *Bennett vs. City of Longview*, 268 S. W. 786.

In the last case above cited, the court uses this language:

“Every public office is the creation of some law, and continues only so long as the law to which it owes its existence remains in force. It logically follows that when that law is authoritatively abrogated, the office ipso facto ceases unless perpetuated by virtue of some other legal provision.”

Under the rule announced in the above cases it is clearly within the power of the Legislature to abolish any office created by statute during the term of the incumbent. That power would necessarily include the lesser power to diminish the compensation incident to such office during the term of an incumbent.

In a conference opinion dated August 6, 1913, prepared by C. M. Cureton, then First Assistant Attorney General, to Louis J. Wortham, passing on a similar question, it was stated:

“But the possession of an office, as has been shown, is not a vested right and therefore this Legislature may increase, diminish or alter the salary of any officer whose salary is fixed by statute instead of by constitution, without violating any provision of either the state constitution or the constitution of the United States. Of course the rule is different as to salaries which are fixed by the constitution of the state, as for instance the salary of the Governor. The Legislature, of course, could not change the salary of the Governor or of any constitutional officer except in the

manner provided by the constitution, but so far as statutory salaries are concerned, the Thirty-third Legislature has absolute plenary power."

The only limitation upon the power of the body entitled to fix said compensation is contained in Article 6824, Revised Civil Statutes, 1925, as amended by Chapter 9, Acts Regular Session Forty-second Legislature, which reads:

"The salaries of officers shall not be increased nor decreased during the term of office of the officers entitled thereto; provided, however, that the members of the Legislature by majority vote may at any time set their salaries at any amount within the constitutional limit."

This is purely a statutory provision which may be amended or repealed at any time and cannot be construed as a limitation upon the power of the Legislature. *Arnold vs. Cass County*, 289 S. W. 749.

What has been said in the foregoing paragraphs of this opinion applies with equal force to the power of the Legislature to diminish the compensation incident to offices created by the constitution, but the emoluments of which are fixed by statute, subject to the limitation that the emoluments of such offices shall not be decreased to such an extent that it would be tantamount to abolition of such offices.

It is therefore our opinions, and you are so advised, that the Legislature has full, complete and ample authority to alter, change or diminish the salary of any officer in this state whose salary is merely fixed by the statutes and not by the constitution, subject to the qualification that where the office is created by the constitution and the salary is fixed by statute the Legislature cannot, of course, abolish the office indirectly by reducing the salary to such an extent that the reduction would have the practical effect of abolishing the office. Opinions of Attorney General of Texas, 1906-8, p. 337; *Bastrop County vs. Hearne*, 70 Tex. 563; 46 C. J. 1020, and cases there cited, Note 11; *Throop on Public Officers*, Sec. 20.

As to the authority of the Legislature to enact such legislation at a special session, I call your attention to Section 40 of Article 3 of the State constitution, which provides:

"When the Legislature shall be convened in special session there shall be no legislation upon subjects other than those designated in the proclamation of the Governor calling such session, or presented to them by the Governor; and no such session shall be of longer duration than thirty days."

While this section of the constitution prohibits legislation upon subjects other than those designated in the proclamation of the Governor, or later submitted by him, it has been held by the Supreme Court of Texas in the case of *Jackson vs. Walker*, 49 S. W. (2d) 693, that a duly authenticated, approved and enrolled statute imports absolute verity and is conclusive that the act was passed in every respect as designated by the constitution, and that resort may not be had to the proclamation of the Governor and the Journals of the two Houses to invalidate the law where the same has been filed with the approval of the Governor in the office of the Secretary of State, and this even though the subject matter contained in the act was not submitted to the special session by the Governor.

From this it follows that such legislation could be enacted by a special session of the legislature if the subject was submitted by the Governor, or if not submitted by the Governor and an act was passed and later approved by the Governor and filed in the office of the Secretary of State, it would still be a valid act even though not submitted.

This opinion is not to be construed as applicable to positions held by virtue of contract nor to offices, the compensation incident to which is fixed by the constitution.

Yours very truly,
 HOMER C. DEWOLFE,
 Assistant Attorney General.

Op. No. 2901

PUBLIC OFFICERS—DISTRICT COURTS—CONSTITUTIONAL LAW
 LEGISLATURE—JUDICIAL DISTRICTS

1. It is not mandatory on the Legislature under Section 1 of Article 5 of the Constitution to maintain a Criminal District Court for Harris County.

2. Under Section 7 of Article 5 of the Constitution the Legislature may abolish a District Judge's office during the term for which he was elected, by abolishing the district over which he presides.

3. The office of a District Judge having been affectually abolished during the term for which he was elected, he could not by writ of mandamus compel the Comptroller of Public Accounts to issue a warrant in his favor for a statutory compensation for the remainder of his term.

OFFICES OF THE ATTORNEY GENERAL,
 AUSTIN, TEXAS, October 17, 1932.

*Honorable Olan R. Van Zandt, Chairman, Judicial Redistricting
 Committee, House of Representatives, Austin, Texas.*

DEAR SIR: Your letter of October 3rd addressed to Attorney General Allred has been received. You submit to this department for answer the following inquiries:

"First. Is it mandatory under the Constitution to maintain a Criminal District Court for Harris County, Texas?"

"Second. Is the District Court such a constitutional office and the Judge holding such an office that prevents the abolishment of such a court during the term for which such a Judge was elected?"

"Third. In the event a court is abolished by the Legislature before the term of office expires, will a mandamus hold compelling the Comptroller to issue a warrant in favor of such Judge for a statutory compensation for the remainder of his term?"

It is the opinion of this department that each of these questions should be answered in the negative.

In discussing your first question, it is necessary to consider Section 1 of Article 5 of the Constitution, which reads:

"The judicial power of this State shall be vested in one Supreme Court in Courts of Civil Appeals, in Courts of Criminal Appeals, in District

Courts, in County Courts, in Commissioners' Courts, in Courts of Justices of the Peace, and in such other courts as may be provided by law.

"The Criminal District Court of Galveston and Harris Counties shall continue with the district jurisdiction and organization now existing by law until otherwise provided by law.

"The Legislature may establish such other courts as it may deem necessary, and prescribe the jurisdiction and organization thereof, and may confer the jurisdiction of the district and other inferior courts thereto."

In this discussion, the underscored portion of Section 1 of Article 5 of the Constitution above quoted must be construed. It is our opinion that the language in this section, "until otherwise provided by law" not only has reference to the organization and jurisdiction of this court, but also to its continuance as a Criminal District Court. The Legislature has heretofore shown that it considers that under this section it was given authority to change the district jurisdiction of this court. See Acts of the Thirty-second Legislature (1911), Chapter 67, wherein the territorial limit of this court as provided in the Constitution was changed by the Legislature so as to eliminate Galveston County and establish within the limits of Harris County a separate Criminal District Court for that county alone. This act restored to the District and County Courts of Galveston County jurisdiction of those cases over which the Criminal District Court of Galveston and Harris Counties had previously exercised.

In *Harris County vs. Crooker*, 248 S. W. 652, decided by the Supreme Court of Texas in 1923, the court in effect upheld the constitutional authority of the Legislature to enact Chapter 67, *supra*. Quoting from that decision:

"In view of the Acts of 1866 and 1870, each of which created the office of District Attorney as a part of the organization of the court, there is no doubt that the word 'organization' as used in the Constitution embraced such an office, and in express language authorized the Legislature to change the law, not only as to the district and jurisdiction of the court, but as to the office of District Attorney as well."

If the Legislature had authority in effect to abolish this Criminal District Court in so far as Galveston County was concerned and confer that portion of its business on the District Courts of Galveston County, we believe that the Legislature has like authority to abolish the Criminal District Court of Harris County and confer the jurisdiction exercised by it upon the other District Courts of that county. We think the use of the phrase, "until otherwise provided by law," by the framers of the Constitution manifests an intent to permit the Legislature to make such changes in the jurisdiction and organization of this court in the future as it might desire, even to the extent of abolishing same.

In *People vs. Wall*, 88 Ill. 75, it is said:

"A Constitution, like any other instrument admits of no interpretation other than that which the common understanding places upon it, where no technical words are employed."

That part of the State Constitution in reference to your second question is Section 7 of Article 5, which in part reads:

"The State shall be divided into as many judicial districts as may now or hereafter be provided by law, *which may be increased or diminished by law* For each district there shall be elected by the qualified voters thereof, at a general election, a Judge, who shall be a citizen of the United States and this State, who shall have been a practicing lawyer of this State or a Judge of a court in this State, for four years next preceding his election, who shall have resided in the district in which he was elected for two years next preceding his election, who shall reside in his district during his term of office, *who shall hold his office for the period of four years*, and shall receive for his services an annual salary of \$2500.00, until otherwise changed by law He shall hold the regular terms of his court at the county seat of each county in his district at least twice in each year, in such manner as may be prescribed by law."

Since every public office is the creation of law, either constitutional or statutory, the general rule is that it continues only so long as the law to which it owes its existence remains in force, and that the office can be abolished during the term of the officer holding such office either by amending the Constitution or statutes, depending on which instrument the office depends for its existence. 46 C. J. 934-935; Lockett vs. Madison County, 137 Miss. 1; 101 So. 851; 37 A. L. R. 814.

Under this section of the Constitution the Legislature is given authority to create new judicial districts. To that extent the office of the Judge of such a created district is an office created by the Legislature. The appointment or election to a public office does not establish a contractual relationship between the person appointed or elected, and the public, so as to fall within constitutional restrictions against legislative impairment of contracts. See R. C. L. Vol 22, pp. 376-379.

In Throop on Public Officers, Section 19, this doctrine is stated as follows:

"It is therefore well settled in the United States that an office is not regarded as held under a grant or a contract within the general constitutional provision protecting contracts; but, unless the Constitution otherwise expressly provides, the Legislature has power to increase or vary the duties or diminish the salary or other compensation appurtenant to the office, or abolish any of its rights or privileges, before the end of the term, or to alter or to abolish the term or to abolish office itself."

Here the Constitution does not expressly provide that an office cannot be abolished before the expiration of the term of the officer holding the office.

In Cowell vs. Ayers, 110 Tex. 348, 220 S. W. 764, the court, in passing on an act of the Legislature creating the Board of Control and abolishing the board of managers of lunatic asylums, used this language:

"Interference with statutory terms of present incumbents furnishes no obstacle to the exercise of the power of the Legislature to abolish offices of its own creation. As declared by Judge Cooley in the case of City of Wyandotte vs. Drennan, 26 Mich. 476, 9 N. W. 500; 'Offices are created for legislative power with such power,

privileges and emoluments attached as are believed to be necessary or important to make them accomplish the purposes designed, but except as it may be sustained (restrained) by the Constitution, the Legislature has the same inherent authority to modify or abolish that it has to create, and it will exercise it with a like consideration in view.'"

In *Bennett vs. City of Longview*, 268 S. W. 786, the court uses this language :

"Every public office is the creation of some law, and continues only so long as the law to which it owes its existence remains in force. It logically follows that when that law is authoritatively abrogated, the office *ipso facto* ceases, unless perpetuated by virtue of some other legal provision."

We believe that the above cases clearly demonstrate the fact that unless the Constitution contains some provision in effect, specifying that a District Judge shall remain in office during the term for which he is elected, the Legislature would clearly have authority to abolish the judicial district over which such a Judge presided during the term for which he was elected. If any such inhibition obtains, it is contained in the language of Section 7 of Article 5 above quoted. This section confers upon the Legislature the authority to increase or diminish the number of judicial districts in this State. The only inhibition in this section is contained in these words, "*who shall hold his office for the period of four years.*" It is our opinion that this phrase, when properly construed in connection with authority granted by the Constitution to the Legislature to diminish the number of districts, simply means that he shall hold his office for the period of four years, subject to the power of the Legislature to abolish his office by abolishing his district.

In *Carter vs. M. K. & T. Ry. Co.*, 106 Tex. 137, 157 S. W. 1169, the court had before it an act of the Legislature creating a special District Court for Grayson County, such court to exist until a designated future date. It was contended that the act violated Section 7 of Article 5 of the Constitution because the Legislature had established a District Court for a less period than the four years provided in the Constitution as the term of office of a District Judge, but the court held that the Legislature had power to limit the existence of the court that it was authorized to create.

The Thirty-ninth Legislature passed an act changing the territory of certain judicial districts by adding certain counties to some of the districts and removing certain counties from others, and providing that the then Judges of the Ninth and Seventy-fifth Judicial Districts should remain as Judges of the reorganized districts and hold their offices until the next general election. The Judge of the Ninth District at the time of the next general election had only been in office two years. As to whether the Legislature had authority to thus shorten the term was before the courts in the case of *State ex rel McCall vs Manry*, 16 S. W. (2d) 609, and *Manry vs. McCall*, 22 S. W. (2d) 348. The court in each of these cases held that the Act of the Thirty-ninth Legislature only reorganized these judicial districts and that the Ninth District was not abolished, and hence the provisions of the Act which attempted to shorten the term of the

Judge and cause a new election for that office, were unconstitutional and void, as being in conflict with the provision of the Constitution providing that the Judge shall hold his office for the period of four years. However, the court in passing on this question uses this language in the first of these cases, the same language being quoted with approval in the second case:

"It is provided by Section 7 of Article 5 of the Texas State Constitution that: The State shall be divided into as many judicial districts as may now or hereafter be provided by law, which may be increased or diminished by law. For each district there shall be elected by the qualified voters thereof, at a general election, a Judge, who shall be a citizen * * * who shall hold his office for a period of four years * * *."

"If the Legislature created no new district, and did not abolish the Ninth District, then it follows that Judge Manry having been elected Judge of the Ninth District in November 1924, at the general election of that year, for a four year term, was entitled to such full four year term under the Constitution, and that the part of Section 5 of the Act of 1925 which attempted to shorten the term and cause a new election in 1925 for such office, was in plain violation of the express provision of our Constitution above quoted, and is null and void. However, this does not affect the validity of the balance of the Act.

"It follows from what we have said that there is no doubt under the Constitution and laws of this State Judge Manry was duly and constitutionally elected Judge of said Ninth District in 1924 for a full four year term, and that, *said district not having been abolished* he was entitled to serve out said full term.

While the court in these cases was not passing upon the question of the authority of the Legislature to abolish the office of a District Judge, we think that by the language used, which is underscored above, the court recognized the fact that the Legislature had authority under the Constitution, by abolishing the district, to in effect abolish the office. In other words, if the district itself were abolished there would be no office for the judge to hold. We think this is the proper interpretation of that part of Section 7 of Article 5 which authorizes the Legislature to increase or diminish the number of judicial districts in this State, and that having granted to the Legislature this authority, it should not be held that the Legislature was without power to exercise it until the term for which the District Judge had been elected had expired, in the absence of a specific provision in the Constitution to this effect. Otherwise the Legislature might in certain instances have to sit silent and permit the continuance of a District Court for four years even though there were no necessity for same.

Should the Legislature in its wisdom decide that the State is now divided into more judicial districts than necessary, it may by abolishing such judicial district, abolish the office of the District Judge for that district before the end of the term for which such Judge was elected without doing violence to the State Constitution.

It is our opinion that by conferring upon the Legislature authority to diminish the number of districts that it was the intention of the framers of the Constitution to permit the Legislature to abolish at any time unnecessary courts and thus cut down the expense incident to the operation of our district courts.

In view of the answer to your first two questions, it seems unnecessary to discuss your third question at length, because if the Legislature has authority to abolish the office of the District Judge before his term of office expires by abolishing the district over which he presides, it necessarily follows that he could not by mandamus compel the Comptroller of Public Accounts to issue a warrant in his favor for the compensation due him for the remainder of his term.

Yours very truly,
 HOMER C. DEWOLF,
 Assistant Attorney General.

Op. No. 2903

CONSTITUTIONAL LAW—SECTIONS 14 AND 16 OF ARTICLE 8 AS AMENDED—AMENDMENTS TO CONSTITUTION—ASSESSOR AND COLLECTOR OF TAXES—SHERIFF AS ASSESSOR AND COLLECTOR OF TAXES

1. The amendments to Sections 14 and 16 of Article 8 which abolish the offices of "tax assessor" and "Tax collector", and which create the office of "Assessor and Collector of Taxes" and make the sheriff in counties of less than ten thousand inhabitants according to the last preceding Federal Census, the assessor and collector of taxes therefor, were intended to become operative when the officers elected at the next regular biennial election to fill the new office, qualify under the law.

OFFICES OF THE ATTORNEY GENERAL,
 AUSTIN, TEXAS, December 21, 1932.

*Honorable Moore Lynn, State Auditor and Efficiency Expert,
 Austin, Texas.*

DEAR SIR: This will acknowledge receipt of your request for the opinion of this department as to the time at which the amendments to Sections 14 and 16 of Article 8 of the Constitution of Texas adopted at the recent general election, become operative and in force.

The amendments in question have the effect of creating a new office into which are merged the offices of Tax Assessor and Tax Collector.

Section 14 of Article 8 was amended to hereafter read as follows.

"There shall be elected by the qualified electors of each county at the same time and under the same law regulating the election of State and County officers, an Assessor and Collector of Taxes, who shall hold his office for two (2) years and until his successor is elected and qualified; and such Assessor and Collector of Taxes shall perform all the duties with respect to assessing property for the purpose of taxation and of collecting taxes as may be prescribed by the Legislature."

Section 16 of Article 8 was amended to read as follows.

"The sheriff of each county in addition to his other duties shall be the Assessor and Collector of Taxes therefor; but, in counties having ten thousand (10,000) or more inhabitants, to be determined by the last preceding census of the United States, an Assessor and Collector of Taxes shall be elected to hold office for two (2) years and until his successor shall be elected and qualified."

The time at which a constitutional amendment becomes operative depends largely upon the intention of the people in adopting the

amendment, and that intention is to be ascertained by considering the language used in the amendment, the objects to be accomplished by the making of the provision and the circumstances surrounding its adoption. 12 Corpus Juris, p. 731, Sec. 108.

Considering the two amendments above quoted in conjunction with each other, we find it provided that in counties having ten thousand inhabitants or more, according to the last preceding Federal Census, there is to be elected an Assessor and Collector of Taxes—one officer, whereas in counties having less than ten thousand inhabitants as determined by the last preceding Federal Census, the sheriff is made the Assessor and Collector of Taxes therefor, in addition to his other duties.

An examination of the language used in the amendment to Section 14 of Article 8 above quoted, discloses that it was not the intention of the people in adopting the amendment to immediately supplant the offices of Tax Assessor and Tax Collector in counties having ten thousand inhabitants or more, according to the last preceding Federal census. You will observe that the amendment provides that “there shall be elected by the qualified voters of each county *at the same time and under the same law regulating the election of State and county officers*, an Assessor and Collector of Taxes * * *”. The language used in the amendment, therefore, shows that it was intended that where an Assessor and Collector of Taxes should be elected, he should be elected at a regular biennial election along with other State and county officers.

You are, therefore, advised that the amendments under consideration would not affect the offices of Tax Assessor or Tax Collector in counties having ten thousand inhabitants or more until an “Assessor and Collector of Taxes” is elected at the next regular biennial election and thereafter qualifies for the new office. *Linthicum vs. School District No. 4 of Choctaw County*, 149 Pac. (Okla.) 898.

We will now consider whether that portion of the amendment to Section 16 of Article 8 which provides that the sheriff, in addition to his other duties, shall be the Assessor and Collector of Taxes for his county, in counties having less than ten thousand inhabitants (as determinable by the last preceding Federal census) was intended to become operative immediately upon its adoption.

Since the amendments to these two sections of the Constitution were submitted together to accomplish a single purpose, they are in *pari materia* and must be considered together in determining the time it was intended that the sheriff in “under” counties should assume the duties of the newly created office. As we have heretofore observed, it was certainly not intended in the adoption of the constitutional amendment to supplant in “over” counties the tax assessor and tax collector, or their successors in office, until an “assessor and collector of taxes” could be elected at the next regular biennial election and until the person so elected qualifies under the law. We believe the language in Section 14, as amended, should be construed as controlling and as expressing the legislative intent, and the intention of the people in adopting this amendment in that, if these

sections be not construed together, there would be a conflict as to when an "assessor and collector of taxes" should be elected even in "over" counties, in that the latter part of Section 16 reads:

"In counties having ten thousand (10,000) or more inhabitants, to be determined by the last preceding census of the United States, an assessor and collector of taxes shall be elected to hold office for two years, and until his successor shall be elected and qualified."

This language is sufficient if considered alone, to require the election of an assessor and collector of taxes in "over" counties immediately upon the effective date of this amendment. We mention this to illustrate that the intention expressed in Section 14 of Article 3, as amended, was evidently intended to control the effective date of all of Section 16, as amended.

These amendments in view of this fact, must mean that at the next regular biennial election, no tax assessor or collector shall be elected, but there shall be elected an "assessor and collector of taxes," who shall discharge such duties with reference to the assessment and collection of taxes as may be prescribed by the Legislature; provided that in "under" counties no assessor and collector of taxes shall be elected, but the sheriff shall in addition to his other duties be such assessor and collector.

There is also doubt as to whether existing statutes are sufficient, if this amendment be immediately operative, to adequately protect the interests of the State. In other words, such provisions in the statutes, as Article 7178, (providing that the tax assessor shall give bond) Article 7183, (that he may administer oaths), Article 7186, (that he shall be subject to the forfeiture of \$50.00 as a penalty for failure to administer oaths, etc.) are incident only to the office of "tax assessor," and would not be applicable to the office of "assessor and collector of taxes." Before the Legislature could remedy these defects, if such they be, the tax assessor in "under" counties elected at the last general election, would have already qualified and entered upon his duties as tax assessor. In this last particular, it has been held by the courts of this State, that the compensation of the tax assessor for his services is intended to apply to services rendered within a given year as a whole, and that he is entitled to compensation for the entire services performed, and that the same is not divisible.

In *Freeman vs. Terrell*, Comptroller, 284 S. W. 946, in an opinion by the Commission of Appeals, in passing on an Act of the Legislature, changing the rate of compensation due the assessor, which became effective near the middle of the year, Judge Powell said:

"The fee statute provides a certain per cent of the assessed valuation as pay for the assessor's 'services'. The compensation is not for taking renditions only. The statute does not say, he shall receive so much for part of his work and something else for other official duties. If the compensation was divisible, it would be possible to apply the 1920 fee statute to part of relator's accounts and the 1925 law to other portions thereof. But since it is impossible to place a value upon his several services, it must be assumed that the Legislature intended to apply the new rate to his 1925 services as a whole. This is all the more reasonable a conclusion in view of

the fact that the Legislature knew he could not present his bill for services until the fall of 1925. At the time his account became due, the new rate was effective. If the Legislature had intended to apply one rate to a part of the account and another to the other, then it should have provided a method for doing so. It should have placed a value on each part of the work. Not having done so, we hold there was no such intention on the part of the law makers."

In view of the above facts, it can be readily seen that to supplant the tax assessor, after he had entered upon the discharge of his duties, and place such duties upon the sheriff, could only cause confusion and, since the Legislature is presumed to have had knowledge of these statutes and the facts herein mentioned, it is believed that such things may be taken into consideration in determining the time at which it was intended that this provision of the Constitution should go into effect.

The effect of these amendments taken together was to abolish the offices of tax assessor and tax collector, and to create a new office, to-wit, that of "assessor and collector of taxes." Therefore, Section 16, as amended, imposes upon the sheriff of the counties of less than ten thousand (10,000) inhabitants, the duties of a new office, an office which he or the people did not know would exist at the time of his election. The writer sees no reason to presume, in the absence of an expressed intention to the contrary that that portion of the amendment making the sheriff the assessor and collector of taxes in "under" counties was intended to go into operation on a date other than that upon which the remainder of the amendment is to become operative.

For reasons herein pointed out and in view of the fact that the effect of the amendment under consideration was to create a new office and to abolish two existing offices, thus imposing upon the sheriff in "under" counties the duties of a new office and not those of an existing office, it is our opinion and you are so advised that it was not intended that the amendment, Sections 14 and 16 of Article 8 should become operative until after the next regular biennial election in 1934, and the qualification of the "assessor and collector of taxes," or "the sheriff and assessor and collector of taxes" in the method prescribed by law.

Yours very truly,
HOMER DEWOLF,
Assistant Attorney General.

Op. No. 2906

HIGHWAY COMMISSIONERS—TERMS OF OFFICE—ARTICLE 6664, R. C. S., 1925 CONSTRUED—CHAP. 152, GEN. LAWS 38TH LEG. 1923, PAGE 325, CONSTRUED

Held that terms of Highway Commissioners expire biennially on February 15th following the adjournment of the Legislature.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, January 28, 1933.

Honorable Cone Johnson, State Highway Department, Austin, Texas.

DEAR SIR: Your letter of January 24th reads as follows:

"I wish to submit to you this question, relating to the expiration of my term of office as a Highway Commissioner.

"I was appointed by Governor Dan Moody for a term of four years on January 27, 1927; I was confirmed by the Senate on the same date, to-wit, January 27, 1927; I qualified and assumed the discharge of the duties February 1, 1927. However, no commission was issued to me until October of that year on account of neglect or delay, I suppose.

"I was reappointed by Governor Moody to fill out the unexpired term of two years of Mr. Sterling upon his election as Governor and retirement from the Highway Commission.

"The question is whether my term of office expires on February 1, six years from the date of my original appointment, or whether it expires on February 15th next. In 1923 the Legislature enacted a law, Chapter 152, page 325, Acts of 1923, which makes the term of office of the Highway Commissioners to begin and expire on the 15th day of February; but my attention has been called to the fact that this provision of law was not carried forward in the revision, or compilation of the statute, as seems to have been the case with a number of acts. I am not familiar with the ruling of the courts, or of the department, as to the legal effect on such acts or provisions as were not carried forward but seem to have been dropped or omitted.

"It is not of great consequence to me whether my term of office expires on the 1st of February next or on the 15th of February next, except that I want to act legally and regularly in the matter and avoid any confusion. I am willing to be governed by your opinion or suggestion in the matter.

"There is to be a meeting of the Commission on the 9th of February, and if my successor is to be appointed by the 1st of February he ought to have notice so that the Governor, the Senate and he may act so that he may attend that meeting of the Commission."

By an act of the 38th Legislature at its regular session (S. B. 152, Gen. Laws, 1923, p. 325). it was provided in part as follows:

"The Governor shall within sixty days after this act becomes effective, by and with the advice and consent of the Senate, appoint three citizens of the state as a board of Highway Commissioners . . . who shall hold their offices until February 15, 1925. That *beginning February 15, 1925*, the terms of office of the members of the Commission shall be for a period of six years, except that those first appointed shall be appointed for two, four and six years. . . . All vacancies which shall appear in the Commission for any reason shall be filled in the same manner as hereinbefore provided."

Pursuant to the terms of this act, on February 9, 1925 (S. J. 1925, p. 321), Governor Miriam A. Ferguson submitted to the Senate for confirmation, among others, the following appointments:

"For State Highway Commission:

"Hon. Frank V. Lanham, of Dallas County, Texas for chairman, *for the term ending February 15, 1927*.

"Hon. Joe Burkett, of Eastland County, *for the term ending February 15, 1929, and*

"Hon. John H. Bickett, of Bexar County, *for the term ending February 15, 1931.*"

These appointments were afterward regularly confirmed by the Senate. Commissioners Frank V. Lanham and Joe Burkett served from February 16, 1925, to December 3, 1925, at which time they resigned (See 7th Biennial Report, State Highway Department, p. 18). Upon the resignation of Lanham and Burkett, Hal Mosely and John M. Cage were appointed and served with Commissioner John H. Bickett, Sr., until October 8, 1926, at which time the entire Commission resigned. (See p. 18, Biennial Report, State Highway Department, *supra*).

Hon. Eugene T. Smith of Tarrant County, Hon. George P. Robertson of Bosque County, and Hon. Scott Woodward of Tarrant County, were given recess appointments to succeed Mosely, Cage and Bickett (Biennial Report, Highway Commission, *supra*). When the 40th Legislature convened on January 11, 1927, Governor Miriam A. Ferguson in a message to the Senate (S. J. 1927, p. 18 and 19) submitted these recess appointments for confirmation, employing the following language:

"On State Highway Commission:

"Hon. Eugene T. Smith, of Tarrant County, chairman, to fill the unexpired term of Hon. Hal Mosely, of Dallas County, resigned, whose term would expire *on February 15, 1927*;

"Hon. Scott Woodward, of Tarrant County, to fill out the unexpired term of Hon. John Cage, of Erath County, resigned, whose term would expire *on February 15, 1929*;

"Hon. George P. Robertson, of Bosque County, in place of Hon. John H. Bickett, of Bexar County, resigned, whose term would expire *on February 15, 1931*."

Immediately after the message submitting these names for confirmation was received by the Senate, a motion was made that the Senate go into executive session to consider these nominations. This motion was tabled (S. J. 1927, p. 19). No further action seems to have been taken toward the confirmation of Mrs. Ferguson's recess appointments to the State Highway Commission until January 20th when Governor Dan Moody addressed the following message to the Senate (S. J. 1927, p. 74):

"I hereby respectfully withdraw from consideration the names of appointees heretofore submitted to you for consideration and confirmation, which up to the present time have not been acted upon."

This purported withdrawal of all appointees was apparently acquiesced in by the Senate since no objection was made, and no point of order raised.

On January 26, 1927, Governor Moody submitted the names of Hon. R. S. Sterling and Hon. Cone Johnson for appointment (S. J. 1927, p. 127 and 128), and employed the following language:

"Hon. R. S. Sterling, of Harris County, Texas, to be member of the Highway Commission to *succeed* Hon. Eugene T. Smith, and the chairman of the Highway Commission *for the term of six years*."

"Hon. Cone Johnson, of Smith County, to be member of the Highway Commission to *succeed* Judge G. P. Robertson *for the term of four years*."

The appointments of Sterling and Johnson were regularly confirmed by the Senate on January 27, 1927 (S. J. 1927, p. 141).

It will be observed that the term for which Sterling was appointed to succeed Hon. Eugene T. Smith expired, however, on February 15, 1927 (See message of Governor Miriam A. Ferguson, S. J. 1927, p. 18). For this reason, apparently, Governor Dan Moody, on January 31, 1927 (S. J. 1927, p. 155). sent to the Senate the following message:

"I heretofore submitted to you the appointment of Hon. R. S. Sterling, of Harris County, as chairman of the Highway Commission to succeed Hon. Eugene T. Smith for the term of six years. This appointment has been confirmed.

"It appears that the term heretofore held by Hon. Eugene T. Smith expires on the 15th of February, and I desire to appoint, with your advice, consent and confirmation, Hon. R. S. Sterling to be Highway Commissioner and chairman of the Commission for the unexpired term of said Eugene Smith."

Governor Sterling's regular six year term began, therefore, on February 16, 1927, and does not expire until February 15, 1933.

The original term to which you, the Hon. Cone Johnson, were appointed for a term of four years expired February 15, 1931 (See message of Governor Miriam A. Ferguson S. J. 1927, p. 18, supra). Meantime, however, Hon. R. S. Sterling, having been elected Governor, resigned as Highway Commissioner on October 6, 1930 (7th Biennial Report, State Highway Department, p. 18), and Hon. Cone Johnson was appointed to fill out his unexpired term. This appointment was submitted to the Senate on January 16, 1931, by Governor Dan Moody (S. J. 1931, p. 24). It was confirmed on January 29, 1931 (S. J. 1931, p. 107). The term which you, the Hon. Cone Johnson succeeded and for which you were confirmed expires, therefore, February 15, 1933.

From your letter it seems that some doubt as to the expiration of this term of office has been created by virtue of the fact that you were originally confirmed January 27, 1927, and qualified on February 1, 1927. The date of your first appointment and confirmation for the four year term, and the date of your qualifying, is at this time immaterial. In the first place, the *original* term to which you were first appointed expired unquestionably in 1931. Meantime, however, you had been appointed and confirmed to fill out the *unexpired* term of Hon. R. S. Sterling, resigned. As pointed out above, this term does not expire until February 15, 1933. This is readily apparent from the fact that Sterling was appointed to *succeed* Hon. Eugene T. Smith; and that Governor Miriam A. Ferguson in her message to the 40th Legislature (S. J. 1927, p. 18). in submitting Smith's name for confirmation, had stated that she was appointing him to fill the unexpired term of Hal Mosely, resigned, "*whose term would expire February 15, 1927.*"

Your letter directs attention to the fact that the provision in the act of 1923 for six year terms "beginning February 15, 1925" was left out of the codification and revision of 1925; and you suggest

that this might possibly have the legal effect to change the date of the beginning or end of these terms of office. We direct your attention, however, to the fact that in the revision of 1925, it is provided in part as follows:

“With the advice and consent of the Senate the Governor shall biennially appoint one member to serve for a term of six years, *the classification to continue as constituted by law.*”

The classification evidently referred to was in part, at least, the dates as to when the terms of office would expire; that is, either two, four or six years. The Revised Statutes of 1925 took cognizance, therefore, of the outstanding and existing terms of office and did not alter the dates of their expiration.

It is a familiar rule that repeals by implication are not favored, and will not be presumed unless the language employed clearly evidences an intention to repeal or modify the terms of existing law. We think the language used and underscored above clearly relates back and has reference to the appointments already made and then in existence, and the terms of office which had not expired.

If there were any doubt, however, the construction thereafter placed upon it in 1927 by Governor Miriam A. Ferguson in her message to the Senate, submitting the names of Smith, Woodward and Robertson (S. J. 1927, p. 18), would lend weight to the conclusion we have reached. In that message she specifically called attention to the dates of *February* 15, 1927, 1929 and 1931, respectively, when the terms of Smith, Woodward and Robertson would expire.

You are, therefore, respectfully advised that your term as a member of the State Highway Commission expires February 15, 1933.

Very truly yours,

JAMES V. ALLRED,
Attorney General of Texas.

Opinion No. 2907

CONSTITUTIONAL LAW—DISTRICT ATTORNEYS—COUNTY OFFICERS.

1. The Legislature may provide that tax collector, district clerks, tax assessor, county auditors, county surveyors, justices of the peace, constables and public weighers shall receive a salary as compensation for their respective services in lieu of fees, commissions, or other mode of remuneration.

2. The Constitution having provided that sheriffs, county judges and county clerks shall be compensated by “fees and perquisites”, and county attorneys by “fees, commissions and perquisites”, the Legislature may not provide another mode of compensation for said officers, hence these officers cannot be paid salaries.

3. The Constitution fixes the salary of district attorneys at five hundred dollars per annum, and authorizes the Legislature to supplement the same by “fees, commissions and perquisites”. The Legislature may not increase or decrease the *salary* of five hundred dollars allowed to district attorneys by the Constitution. If it wishes to grant district attorneys a greater compensation than the five hundred dollar *salary* allowed by the Constitution, it may do so *only* by allowing them “fees, commissions and perquisites.”

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, January 30, 1933.

Senate Investigating Committee, Capitol Station, Austin, Texas.

GENTLEMEN: Honorable George C. Purl, a member of your Committee, recently addressed to the Attorney General a letter in behalf of the Committee, reading as follows:

"Will you kindly advise this Committee whether or not the Legislature, if it saw fit, could place the following officers on a salary basis in lieu of all fees:

- | | |
|----------------------|-------------------------|
| 1. Sheriff | 6. Justice of the Peace |
| 2. Tax Collector | 7. Constable |
| 3. District Clerk | 8. County Attorney |
| 4. District Attorney | 9. Tax Assessor |
| 5. County Clerk | 10. County Judge |
| | 11. County Auditor |

"The wisdom or policy of placing such other officers as public weigher, county surveyor, etc., probably is not pertinent at this time, but in order to include them all while we are on this subject we might as well ask the same question pertaining to them.

In the event some of the above officers' remuneration is authorized by the Constitution, will you please list those particular officers who do not come under the Constitution and who could be placed on a salary basis without a Constitutional Amendment."

In reply you are advised that there are no constitutional objections to the Legislature providing for the compensation of district clerks, justices of the peace, tax assessors, tax collectors, constables, county auditors, public weighers, and county surveyors by salaries. All of these officers are creatures of the Constitution, except county auditors and public weighers. The Constitution is silent as to the manner of compensating them.

The pertinent constitutional provisions relating to sheriffs, county judges, county clerks, county and district attorneys respectively are as follows:

Sheriffs:

Section 23, Article 5, provides for the election of a sheriff in each county by the qualified voters thereof, fixes the term of his office at two years, and further provides:

"* * * whose duties and perquisites and fees of office shall be prescribed by the Legislature."

County Judges:

Section 15, Article 5, establishes a county court in each county of this State, provides for the election of a county judge, fixes his term of office, and provides for his compensation in this language:

"He shall receive as compensation for his services such fees and perquisites as may be prescribed by law."

County Clerks:

Section 20, Article 5, provides for the election of a county clerk, fixes his term of office, declares he shall be the clerk of the county and commissioners courts, and the recorder of the county, and provides for his compensation, and other duties as follows:

"* * * whose duties, perquisites and fees of office shall be prescribed by the Legislature."

County and District Attorneys:

Section 21, Article 5, reads:

"A county attorney, for counties in which there is not a resident criminal district attorney, shall be elected by the qualified voters of each county, who shall be commissioned by the Governor, and hold his office for the term of two years. In case of vacancy the commissioners' court of the county shall have power to appoint a county attorney until the next general election. The county attorneys shall represent the State in all cases in the district and inferior courts in their respective counties; but if any county shall be included in a district in which there shall be a district attorney, the respective duties of district attorneys and county attorneys shall in such counties be regulated by the Legislature. The Legislature may provide for the election of district attorneys in such districts, as may be deemed necessary, and make provisions for the compensation of district attorneys, and county attorneys; provided, district attorneys shall receive an annual salary of five hundred dollars, to be paid by the State, and such fees, commissions and perquisites as may be provided by law. County Attorneys shall receive as compensation only such fees, commissions and perquisites as may be prescribed by law."

It will be noted that in the above section, the only reference made to a criminal district attorney is in the first paragraph of said section, wherein it is provided that:

"A county attorney, for counties in which there is not a resident criminal district attorney, shall be elected by the qualified voters of each county, who shall be commissioned by the Governor and hold his office for the term of two years."

There is no other mention made in the Constitution of a criminal district attorney. The distinction, if any, between the office of district attorney and the office of criminal district attorney is not clear to me. The Constitution specifically provides for the creation of the former and perhaps by implication authorizes the latter, but apparently the officers are, in effect, the same. In so far as I have been able to ascertain, there has been no discussion of the subject by any of the appellate courts of this State. The office of county attorney was created by the Constitution of 1876. It did not exist prior thereto.

The pertinent provisions of the Constitution of the Republic of Texas, and the former Constitutions of this State, relating to district attorneys, are as follows:

CONSTITUTION OF THE REPUBLIC OF TEXAS:

Section 5, Article 4:

"There shall be a District Attorney appointed for each district, whose duties, salaries, perquisites and term of service shall be fixed by law."

CONSTITUTION OF THE STATE OF TEXAS, 1845:

Section 12, Article 4:

"The Governor shall nominate and by and with the advice and consent of two-thirds of the Senate appoint an Attorney General, who shall hold his office for two years, and there shall be elected by joint vote of both Houses of the Legislature, a District Attorney for each district, who shall hold his office for two years; and the duties, salaries, and perquisites of the Attorney General and District Attorneys, shall be prescribed by law."

CONSTITUTION OF THE STATE OF TEXAS, 1861 :

Section 12, Article 4 :

"The Governor shall nominate and by and with the advice and consent of two-thirds of the Senate appoint an Attorney General, who shall hold his office for two years, and there shall be elected by joint vote of both Houses of the Legislature, a District Attorney for each district, who shall hold his office for two years; and the duties, salaries, and perquisites of the Attorney General and District Attorneys, shall be prescribed by law."

CONSTITUTION OF THE STATE OF TEXAS, 1866 :

Section 14, Article 4 :

"There shall be a District Attorney for each Judicial District in the State elected by the qualified electors of the District, who shall reside in the District for which he shall be elected; shall hold his office for four years; and, together with the perquisites prescribed by law, shall receive an annual salary of one thousand dollars, which shall not be increased or diminished during his term of office."

CONSTITUTION OF THE STATE OF TEXAS, 1869 :

Section 12, Article 5 :

"There shall be a District Attorney elected by the qualified voters of each Judicial District, who shall hold his office for four years; and the duties, salaries, and perquisites of District Attorneys shall be prescribed by law."

It will be noted that under the Constitution of the Republic and the State Constitutions of 1845 and 1861, district attorneys received such salaries and perquisites as were prescribed by law. The Constitution of 1866 fixed the salary of these officers at one thousand dollars per annum, and such perquisites as prescribed by law, while the Constitution of 1869 provided that "the duties, salaries and perquisites of district attorneys shall be prescribed by law." Prior to the adoption of the Constitution of 1876, there never had been any constitutional provision providing for the payment of fees to district attorneys.

The present Constitution has provided for the compensation of county judges, county clerks, and sheriffs by prescribing that the same shall be "fees and perquisites," "perquisites and fees," and "perquisites and fees," respectively, as may be fixed by the Legislature. It provides a district attorney "shall receive an annual salary of \$500.00 to be paid by the State, and such fees, commissions and perquisites as may be provided by law. County attorneys shall receive as compensation only such fees, commissions and perquisites as may be prescribed by law."

Sheriffs, county judges, county clerks, and county attorneys have always been paid for services rendered by fees and ex-officio allowances. No constitutional or statutory provision has ever specifically provided that any of these officers should be paid a salary.

The law books are full of definitions of the terms "fees," "commissions," "perquisites" and "salaries." I shall not attempt to distinguish all of these terms, but they are clearly distinguishable. I will draw a distinction between the words "salary" and "fees." These words have their ordinary signification, the distinction being that a salary is fixed compensation for regular work, while fees are

compensation for particular services rendered at irregular periods payable at the time the services are rendered. *Cochise County vs. Wilcox* (Ariz.) 127 Pac. 758, 759. "Salary" is generally regarded as a periodical payment dependent upon time, while "fees" depend on services rendered. *State vs. Blank*, (Kan.) 136 Pac. 947; *Lobano vs. Police Jury*, 90 So. 423, 425, 150 La. 14, and the numerous authorities found in *Words & Phrases, First Series, Vol. 7, page 6287, et seq.*, as well as in subsequent series of this publication; *Corpus Juris, Vol. 54, 1120 et seq.*; 25 *Corpus Juris, 1010.*

Lexicographers and some authorities class "salary" and "wages" as synonymous, but the terms "salary" and "fees" are not held synonymous, since fees indicate compensation for recompense for particular acts or services. *Landis vs. Lincoln County*, (Or.) 50 Pac. 530.

In the *Lobano* case the court, after discussing the distinction to be made between the terms "fees" and "salaries" said: "While the terms may be more or less synonymous in many connections, they are not so as ordinarily used in connection with the compensation of any office. 34 Cyc. 462."

The Constitution of Alabama contains a section reading as follows:

"The salary, fees or compensation of any officer holding any civil office of profit under this state, or any county or municipality thereof, shall not be increased or diminished during the term for which he shall have been elected or appointed."

The Supreme Court of Alabama has held that the term "salary," as used in the above quoted section of the Constitution of that state, as applied to the compensation of a public officer for services rendered, does not denote the same class of compensation as indicated by the expressions "fees," "commissions" and "percentages." *Osborn vs. Henry*, 76 So. 119, 121, 200 Ala. 353, and the authorities there cited.

Section 22, Article 4, of our Constitution prescribes the compensation of the Attorney General in this language:

"He shall receive for his services an *annual salary* of two thousand dollars, and no more, besides such fees as may be prescribed by law; provided, that the fees which he may receive shall not amount to more than two thousand dollars annually."

Here, as in Section 21, Article 5, a clear distinction is drawn between the terms "salary" and "fees."

Words used in the Constitution and statutes should be given the meaning intended by the framers of the former and the Legislature that enacted the latter. This meaning may be ascertained from the language used in connection therewith. The framers of our Constitution evidently drew a distinction between the word "salary" and the words "fees, commissions and perquisites," as used in Section 21, Article 5. Our Constitution was ratified on the third Tuesday in February, 1876; declared adopted by proclamation of the Governor March 4, 1876, and became effective April 18, 1876. Shortly thereafter, the Legislature convened and passed appropriate legislation, providing for the collection of certain fees and commissions as compensation for the performance of certain duties by sheriffs,

county judges, county clerks, county and district attorneys, respectively. These statutes, with amendments, are still in force, except as applied to some district attorneys. District Attorneys have been allowed the annual salary of five hundred dollars authorized by the Constitution in addition to fees, commissions and perquisites. No statute has ever been enacted since the adoption of our present Constitution, providing for the compensation of sheriffs, county judges, county clerks, and county attorneys by salary. Therefore, the courts of this State have never passed upon the question of whether the Legislature has the authority to provide that these officers may be compensated exclusively by salaries. The question was raised in the case of *Lewis vs Terrell*, 273 S. W. 560, but the Commission of Appeals held that the statute there under consideration did not attempt to provide for payment of the constitutional salary of five hundred dollars allowed district attorneys to county attorneys performing the duties of district attorneys, and therefore it was not necessary for the court to pass upon the question of the Legislature's authority to make such a provision.

Our Supreme Court in the case of *Veltman vs. Slater et al.*, 217 S. W. 373, had before it the question of the authority of the Legislature to authorize commissioners courts to allow ex-officio compensation to county attorneys under Article 21, Section 5, of our Constitution. The court held that the statute authorizing such compensation was valid. We think this opinion is correct for the reason that the statutes impose many duties upon county attorneys for which they receive no compensation whatever. These officers must, under the statute, advise all county officers about matters pertaining to their official duties and for this service no specific fees or other compensation is fixed. While the court gave to the word "fees" its broadest definition, and holds that it means "the reward or compensation or wages allowed by law in return for their services," it does not attempt to in anyway pass upon the identical question we now have under consideration.

Our statutes also authorize counties to allow ex-officio compensation to sheriffs, county judges, and county clerks. Each of these officers are required to perform certain duties for the county and for which no specific fee is allowed by law and by reason of the very nature of these services it would be impractical, if not impossible, to provide a specific fee for each service. This compensation is either a fee or a perquisite, it is not a salary.

It is my opinion that the Legislature may not, under the several constitution provisions hereinabove quoted, provide that sheriffs, county judges, county clerks, district and county attorneys be compensated for their services by salaries. Of course, the Constitution allows a salary of five hundred dollars to district attorneys. The Legislature cannot add to nor take from that provision. It may fix absolutely the salaries of district attorneys at five hundred dollars per annum. It cannot provide for a salary greater or less than that amount. If any additional compensation is allowed a district attorney, it must be in the nature of "fees, commissions and perquisites." I think it is too clear for argument that the framers of our Constitution did make a clear distinction in this section and article of

our Constitution between "salary" and "fees." All the constitutional provisions relating to the compensation of the several officers under consideration were framed, adopted and became effective at the same time. They must be considered together and the meaning given to the word "fees" in one section of the Constitution, should not, in the absence of some express provision, evidencing a different intention, be given a different meaning in another section. The language used in the Constitution with reference to the compensation of county attorneys shows clearly that a salary cannot be paid to such officers.

Legislatures have heretofore evidently entertained the same view, for in 1913, 1919 and 1927, amendments to the Constitution were submitted to the people for ratification, which would have the effect of removing all doubt upon the question under consideration.

The pertinent part of the amendment proposed by the Thirty-third Legislature read:

"All state, district, county and precinct officers within the State of Texas shall hereafter be compensated by the payment of a salary to be fixed and provided for by the Legislature."

The pertinent part of the proposed amendment submitted by the Thirty-sixth Legislature, read:

"Compensation of public officials: All State, district, county and precinct officers within this State shall receive as compensation for their services a salary, the amount of which, the terms and methods of payment and the fund out of which such payment shall be made, shall be ascertained, declared and fixed by the Legislature from time to time; provided that the Legislature may make such exceptions as it may deem advisable.

"This section shall supersede all other provisions of this Constitution fixing and declaring the compensation of officers by salary, fees or otherwise and all provisions for salaries or other compensation for public officials, executive, legislative or judicial."

The pertinent part of the proposed amendment submitted to the people by the Fortieth Legislature read:

"The Legislature may provide compensation for said district and county officers to-wit: District attorney, county judge, county attorney, sheriff, county clerk, district clerk, county tax assessor and county tax collector, by prescribing their duties and fixing salaries in lieu of fees, commissions and other perquisites, as now provided by the Constitution."

The people rejected each of these proposed amendments.

I am herewith enclosing copy of departmental opinion No. 2075, dated May 29, 1919, addressed to the Honorable G. G. Hazel, County Attorney, Eastland, Texas, and signed by E. P. Smith, Assistant Attorney General. This opinion is to the effect that the Legislature is without authority to change the compensation of county attorneys from "fees of office" to a salary or per diem remuneration. In so far as I have been able to ascertain, this opinion has never been overruled by this department.

Very truly yours,

BRUCE W. BRYANT,
First Assistant Attorney General.

Op. No. 2908

PUBLIC OFFICERS—UNIVERSITY OF TEXAS REGENTS
—DATE OF EXPIRATION OF TERMS OF

1. Members of the Board of Regents of the University of Texas, where appointed for full terms, hold office for approximately six years from the date of their appointment, and until the regular session of the third Legislature thereafter.

2. Terms of office of three University Regents expire at each regular session of the Legislature, and the incoming Governor has the power and privilege, by and with the advice and consent of the Senate, of appointing their successors.

3. Custom by which incoming Governor appoints Regents having been followed for more than fifty years, fixes construction of ambiguous statute.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, January 16, 1933.

*Honorable R. S. Sterling, Governor of Texas, Executive Offices,
Capitol.*

DEAR GOVERNOR: Receipt is acknowledged of your inquiry of the fifteenth instant, reading as follows:

“Will you kindly advise me whether or not you concur in the opinion prepared by First Assistant Attorney General Wright Morrow of Feb. 9, 1925, in reference to the expiration dates of the Regents of the University of Texas.”

In response to said inquiry, you are advised that I concur in the main with the opinion referred to above, which is conference opinion No. 2583 of this department, dated February 9, 1925, printed at page 467, Report of the Attorney General, 1924-1926

Your attention is called to the fact, however, that Mr. Morrow's opinion covers several points, and while I believe the opinion to be correct in its principal holding I find myself unable to agree with certain statements contained therein which are not material to a decision of the question then under consideration.

In your letter you do not apprise us as to the exact inquiry you have in mind, but Judge Bruce W. Bryant, First Assistant Attorney General, has given me a brief statement of the situation as he understands it from a conversation with you today. I am informed that at the time of the convening of the Regular Session of the Forty-third Legislature, you nominated for reappointment and confirmation by the Senate three members of the present Board of Regents of the State University. The question has arisen as to whether you, as retiring Governor, should make these appointments for the succeeding six-year term or whether the incoming Governor (to be inaugurated January 17, 1933) would be entitled to fill these offices. As you will observe from the official records and history of appointments to the Board of Regents of the University, herein-after set out, the problem now confronting you is not identical with the question submitted to my predecessor in 1925.

The Journal of the State Senate for the Regular Session of the Thirty-ninth Legislature, which convened January 15, 1925, (Journal P. 23), reveals that the Honorable Pat M. Neff, the then retiring

Governor, sent to the Senate for confirmation on January 14, 1925, the following appointments to the Board of Regents of the University: Charles E. Marsh, Tucker Royall, W. S. Whaley, Dr. Joe Wooten and R. G. Storey. On January 19, 1925, Governor Neff submitted the additional name of Earl C. Hankamer (Journal, p. 76). This made a total of six names submitted to the Senate just prior to the retirement of Governor Neff. The Journal further shows (pp. 23 and 76) that these men had been nominated by the Governor for appointments for places on the Board of Regents on various dates during the years 1923 and 1924. On January 19, 1925, Tucker Royall and R. G. Storey were confirmed. (Journal p. 80). The other four appointments having been rejected, Governor Neff submitted on January 20, 1925, the appointments of Cullen F. Thomas, W. W. Woodson, T. W. Davidson and Miss Florence Sterling to fill the places vacant by the failure of the Senate to confirm Marsh, Wooten, Hankamer and Whaley (Journal p. 82). After Governor Miriam A. Ferguson had been inaugurated, she appointed Marcellus Foster, Ted Dealey, George W. Tyler, S. C. Padelford and L. J. Truett. This was on January 29, 1925. (Journal p. 180). The message submitting the appointments stated that each of these appointees were to fill certain unexpired terms with the exception of Marcellus Foster, whose appointment carried this notation, "full six year term." Messrs. Foster, Dealey, Tyler, Padelford and Truett were all confirmed on January 30, 1925. (Journal, p. 200).

On February 9, 1925, Governor Ferguson submitted the following additional appointments for membership on the Board of Regents: Edward Howard, to fill the unexpired term of Ted Dealey, resigned; Mart H. Royston, to fill the unexpired term of L. J. Truett, resigned; H. J. L. Stark, "for the term ending 1931", and Sam Neatherly, "for the term ending 1931." (Journal, p. 322). On February 11, 1925, these four appointments were confirmed by the Senate. (Journal p. 379).

In the meantime, on January 30, 1925, the Senate, by simple resolution No. 21, requested Governor Ferguson to advise that body as to the dates of the terms of office of all Regents for the University, including those serving and those submitted to the Senate. (Journal, p. 192). In answer to that resolution, Governor Ferguson on February 2, 1925, advised the Senate as follows:

"Gentlemen: Complying with your request as set forth in Resolution No. 21, by Senator Murphy, requesting the dates of the terms of office of all regents of the University of Texas, those now serving, and those submitted to the Senate, you are advised as follows:

"Mrs. H. J. O'Hair (now serving); term expires May 11, 1927.

"R. G. Storey (now serving); term expires June 28, 1929;

"H. J. L. Stark (now serving); term expires May 28, 1925.

"Ted Dealy (newly appointed); term expires June 28, 1929.

"Geo. W. Tyler (newly appointed); term expires June 28, 1929.

"S. C. Padelford (newly appointed); term expires November 1, 1927.

"L. J. Truitt (newly appointed); term expires May 11, 1927.

"Marcellus Foster, appointed for full six year term.

Respectfully submitted,

Miriam A. Ferguson,
Governor

"P. S. One vacancy by virtue of the resignation of H. A. Wroe, whose term expires February 3, 1925." (Journal, p. 223).

The next day, by Senate Resolution No. 25, Attorney General Moody was requested to advise the Senate of the dates when the term of each member of the Board of Regents of the University of Texas begins and expires, and the length of term of each and whether the appointment of a Regent to succeed another is for a full term of six years from the date of the appointment or for the unexpired portion of the term. The resolution, after reciting that confusion existed over the terms of the members of the Board of Regents, requested certain other information relative to such terms. (Journal, p. 242. The resolution is copied in full in the Report of the Attorney General, 1924-1926, p. 467. In compliance with that request, the then Attorney General, on February 9, 1925, rendered the opinion inquired about by you. The substance of that opinion is that Governor Ferguson was wrong in her statement found at page 223 of the Journal of said Session, when she fixed the expiration dates of three of the members in May, three in June and one in November. Mr. Morrow, (who wrote the opinion), held in substance that an appointment for an unexpired term of office was valid only until the date when that regular term would have expired had no vacancy occurred. That opinion was in accord with a previous conference opinion of this department (No. 2572, dated November 19, 1924, addressed to the Hon. W. W. Boyd, Game, Fish Oyster Commissioner, and written by Assistant Attorney General L. C. Sutton. See Report of Attorney General 1924-1926, p. 344). Mr. Sutton's opinion was to the effect that an appointment to a vacancy in an office was for the unexpired term only, and not for a full term.

It was held in Mr. Morrow's opinion, however, that the term of a member of the Board of Regents expired with the *convening* of the Regular Session of the third succeeding Legislature after the session at which he was appointed. This opinion is self-contradictory; in four different places, it is stated that the terms of the members of the Board of Regents expire with the *convening* of the Legislature; while, in the same breath, the writer states that:

"We do not think it particularly material as to the day of the month that a Regent is appointed, because, as stated heretofore, *the term of office is for six years beginning during the Regular Session of the Legislature and ending at the convening of or during the session of the second succeeding regular session thereafter.*" (Underscoring ours.) (Report of Attorney Gen., 1924-1926, p. 472).

Mr. Morrow was evidently in doubt as to the exact date that the terms of the members of the board *expired*, but correctly held that they expired *during* the Regular Session of the third succeeding Regular Session of the Legislature after the session at which they

were appointed. It will be observed, therefore, that the primary question for consideration at the time of Mr. Morrow's opinion was whether the terms of the members of the Board of Regents expired *during* Regular Sessions of the Legislatures or at arbitrary dates during the months of May, June and November (which happened to be the months during which some appointments had been theretofore made).

To answer your inquiry, it becomes necessary to examine the statutes and their heretofore established construction. The earliest governing board provided for the University of Texas was a Board of Administrators of ten members, created by an Act of 1858, two of said members being the Governor and the Chief Justice of the Supreme Court, and the other eight being appointed by the Governor by and with the consent of the Senate for four year terms. 4 Gammel's Laws of Texas 1020.

The first "Board of Regents" was created by the Act of 1881, being "An Act to Establish the University of Texas". It provided for a governing board, to be called the "Board of Regents", and to consist of eight members selected from different portions of the State, to be nominated by the Governor and appointed by and with the advice and consent of the Senate. Section 6 of that act reads as follows:

"The board of regents shall be divided into classes, numbered one, two, three and four, as determined by the board at their first meeting; shall hold their offices two, four, six and eight years, respectively, from the time of their appointment. From and after the 1st of January, 1883, two members shall be appointed at each session of the Legislature to supply the vacancies made by the provisions of this section, and in the manner provided for in the preceding section, who shall hold their offices for eight years respectively." 9 Gammel's Laws of Texas 172.

It will be noted that the second sentence of Section 6, above quoted, specifically provides that two members of the board were to be appointed *at each session of the Legislature*, beginning with that session convening after the first day of January, 1883. The Act of 1881 was approved March 30, 1881, and took effect June 30, 1881. It was the intention of the Legislature at that time that a board with overlapping terms be created. While the Constitution did not permit that, overlapping terms were filled until the decision of *Kimbrough vs. Barnett*, 93 Tex. 309, 55 S. W. 120, by the Supreme Court. Following that decision, the practice was established in 1901 and has since been followed by which each **incoming** Governor appointed a full board of eight members. Such board served for two years and a new board was appointed every two years.

The last Board of Regents of the University selected prior to the adoption of the constitutional amendment of 1912 was that appointed by Governor O. B. Colquitt shortly after he was inaugurated in January 1911. On January 19, 1911, Governor Colquitt appointed eight members of the board, all of whom were confirmed on January 20, 1911. (See p. 128, Senate Journal, Reg. Ses., 32nd Leg., 1911).

Section 30a of Article 16 of the Constitution of Texas was submitted to the people by the Legislature at its Regular Session in 1911, and was adopted in 1912. That section reads as follows:

"The Legislature may provide by law that the members of the Board of Regents of the State University and board of trustees or managers of the educational, eleemosynary, and penal institutions of the State, and such boards as have been, or may hereafter be established by law, may hold their respective offices for the term of six (6) years, one-third of the members of such boards to be elected or appointed every two (2) years in such manner as the Legislature may determine; vacancies in such offices to be filled as may be provided by law, ("") and the Legislature shall enact suitable laws to give effect to this section."

On February 8, 1913, following the adoption of this amendment, and shortly after his inauguration for a second term, Governor Colquitt appointed seven members of the Board of Regents. Two additional members were appointed later on; one on July 1, 1913, the effective date of Chapter 103 of the General Laws of the Regular Session of the Thirty-third Legislature, reading, in so far as applicable to the present question, as follows:

"Section 1. The Board of Regents of the University of Texas shall be composed of nine persons who shall be qualified voters; the Board of Directors of the Agricultural and Mechanical College of Texas shall be composed of nine persons, who shall be qualified voters; the State Board of Regents of the Normal Colleges shall be composed of six persons, who shall be qualified voters; the Board of Regents of the College of Industrial Arts for Women shall be composed of six persons, three of whom may be women; the Board of Managers of the Blind Institute, the Deaf and Dumb Institute, the Deaf, Dumb and Blind Institute for Colored Youths, the Confederate Home, the Confederate Woman's Home, of each of the Insane Asylums, the Epileptic Colony and the Orphans Home, shall each be composed of six members, who shall be qualified voters.

"Sec. 2. The members of the governing board of each of the State institutions of higher education mentioned in Section 1 shall be selected from different portions of the State, and shall be nominated by the Governor and appointed by and with the advice and consent of the Senate. In event of a vacancy on said board, the Governor shall fill said vacancy until the convening of the Legislature and the ratification by the Senate. The members of each of said boards who shall be in office at the time this Act takes effect shall continue to exercise their duties until the expiration of their respective terms, as shall be determined according to requirements of Section 3 of this Act, and additional members shall be appointed in the manner prescribed herein to fill out the membership herein provided for.

"Sec. 3. The following members of the several governing boards shall be divided into equal classes, numbered one, two and three, as determined by each board at its first meeting after this Act shall become a law, these classes shall hold their offices two, four and six years respectively from the time of their appointment. And one-third of the membership of each board shall hereafter be appointed at each regular session of the Legislature to supply the vacancies made by the provisions of this Act and in the manner provided for in Section 2, who shall hold their offices for six years, respectively. The duties of the several governing boards shall be determined by law heretofore enacted or that may hereafter be enacted, no changes in the said duties being made by this Act."

That portion of the first section of the above quoted act dealing with the Regents of the University of Texas now appears as Article 1907, Revised Civil Statutes, 1925.

On the 20th day of September, 1913, the nine men then constituting the Board of Regents drew lots and they, (or some one thereafter appointed to succeed such as had resigned), held office for approximately two, four and six years, from February 8, 1913. (Senate Journal, Reg. Ses., 39th Leg. p. 364, 365.)

Prior to 1913, it had been the long established practice and custom for each *incoming* Governor, during each regular biennial session of the Legislature, to appoint a Board of Regents. Since 1913, it has likewise been the practice for each newly elected Governor to appoint three persons to membership on the Board of Regents, each to serve for six years.

In 1915 three appointments were made by Governor Jas. E. Ferguson, on February 3rd, shortly after his first inauguration. In 1917 three appointments were made by him on January 27th, shortly after his second term began. In 1919, the three appointments were made on January 31st, by Governor W. P. Hobby. In 1921, the appointments were made on May 11th by Governor Pat M. Neff; while in 1923 they were made by him on June 28th. (P. 365, Senate Journal, Reg. Ses., 39th Leg.)

Since 1923 appointments have been on varying dates, but always after the recently elected Governor had been inaugurated, with the exception of the above stated instance when Governor Neff made certain appointments which were not confirmed.

Since the rendition of the opinion of February 9, 1925, by Mr. Morrow, this established custom of appointment by the incoming Governor has been continued. Governor Miriam A. Ferguson, shortly after her inauguration in 1925, appointed members of the Board of Regents, as hereinabove related. Three members were appointed by Governor Dan Moody after his first inauguration; he appointed three additional members in 1929, said appointments being made after his inauguration for a second term. Three new members were appointed by Your Excellency after your inauguration in 1931.

My conclusion that the opinion of Mr. Morrow is not controlling and is not in point, is borne out by the fact that Governor Moody, (during whose administration as Attorney General the opinion was rendered) later during both of his administrations as Governor followed the long established custom of his predecessors.

Mr. Morrow in his opinion (Report of Attorney Gen., 1924-1926, p. 469) invokes the well known rule of contemporaneous construction (with which I am in entire accord), and points to the fact that in January, 1915, three persons were appointed as Regents, to-wit: Dr. George McReynolds, Dr. S. J. Jones and M. Faber. He evidently overlooks the fact that the regents named were appointed by the *incoming* Governor—at that time (January, 1915), James E. Ferguson. The rule of construction by custom supports, therefore, my conclusion that the duty or privilege of appointment, in this instance, is that of the *incoming* administration.

It will be noted that the statute merely states that the members of the Board of Regents shall be *appointed* at each Regular Session of the Legislature. It does not state that these appointments shall be

made at the convening of each Regular Session of the Legislature; and, in my opinion, the Legislature, in enacting Chapter 103, General Laws, Regular Session of the Thirty-third Legislature in 1913, did not intend to disrupt the then established custom of having such appointments made by the incoming governor. That act simply added an additional member to the Board of Regents, raising the the membership to the present number (nine), and the terms of office of the members were lengthened and overlapping terms were created under authority of Section 30a, Article 16 of the Constitution. (Adopted in 1912).

In this opinion I have made no reference to those members who were appointed to serve unexpired terms. Members appointed to serve unexpired terms would not serve a full six years, but would serve to the date of expiration of the term to which they were appointed, which expiration date will be unchanged by the vacancy and appointment to fill the vacancy. (See Opinions of the Attorney General, 1924-1926, p. 344).

In my opinion, the practical construction of the statutes, which has been long followed by the chief executives of this State, constitutes the true construction thereof and settles the question of the duty or privilege of appointment of members of the Board of Regents.

Very truly yours,

JAMES V. ALLRED,
Attorney General of Texas.

Op. No. 2909

PUBLIC OFFICERS—STATE BOARD OF EDUCATION
—TERMS OF OFFICE OF MEMBERS.

Terms of office of members of State Board of Education expire January 1st and the governor holding office at date of expiration of these terms has the power to reappoint them or name their successors.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, January 16, 1933.

To the Honorable President and Members of the Senate of the Forty-third Legislature.

GENTLEMEN: Receipt is acknowledged of a copy of Senate Resolution No. 11 adopted by Your Honorable Body today, requesting that I furnish to the presiding officer of the Senate, at my earliest convenience, an opinion answering the following questions, to-wit:

“What date does the term of the Honorable B. F. Tisinger, Member of the State Board of Education expires?”

“What date does the term of the Honorable C. H. Chernosky, Member of the State Board of Education, expire?”

“What date does the term of the Honorable Tom Garrard, Member of the State Board of Education, expire?”

“Does the Governor holding office as Governor on the date of expiration of terms of office of above named officials have the power under the laws of this State to reappoint or name their successors?”

Upon examination of the relevant constitutional and statutory provisions and executive action based thereon, I find the following:

The Constitution of 1876 created a State Board of Education composed of the Governor, Comptroller and Secretary of State. Article 7, Section 8, Constitution of the State of Texas. By statute the Governor was made ex-officio President of the Board and the State Superintendent of Public Instruction was made ex-officio Secretary of the Board. Article 2664, Revised Civil Statutes, 1925. This board composed of the Governor, Comptroller and Secretary of State, serving in the manner provided by the Constitution, performed the functions of the State Board of Education prior to the amendment of the Constitution in 1928.

By House Joint Resolution No. 14, the Fortieth Legislature of the State of Texas at its Regular Session held in 1927 proposed that Section 8 of Article 7 of the Constitution be amended and that a new section to be known as Section 16 of Article 7 be added to the Constitution of 1876. General and Special Laws of Texas, 40th Legislature, Regular Session, page 499. The proposed amendments were adopted at the general election held on November 6, 1928, and now form a part of our Constitution. Section 8, Article 7, as amended, now reads as follows:

"The Legislature shall provide by law for a State Board of Education, whose members shall be appointed or elected in such manner and by such authority and shall serve for such terms as the Legislature shall prescribe not to exceed six years. The said board shall perform such duties as may be prescribed by law."

Section 16, Article 8, being the added section, now reads as follows:

"The Legislature shall fix by law the terms of all offices of the public school system and of the State institutions of higher education, inclusive, and the terms of members of the respective boards, not to exceed six years."

Pursuant to such constitutional authority, the Forty-first Legislature of Texas, at its 2nd Called Session, created a State Board of Education to be composed of nine members, to be appointed by the Governor with the advice and consent of the Senate. General Laws, 2nd Called Session, 41st Legislature, Ch. 10, p. 12.

Section One of said Act reads as follows:

"Section 1. There is hereby created the State Board of Education. Said Board shall consist of nine members to be appointed by the Governor, with the advice and consent of the Senate. Of the first Board to be appointed the terms of three members shall expire on January 1, 1931; the term of the next three members shall expire on January 1, 1933; and, the terms of the remaining three members shall expire on January 1, 1935. After the first Board, the term of each member shall be for six years from the date of the respective appointments, and the appointments shall be made and the terms arranged in such manner that three of said members shall retire on the first day of January biennially, and the Governor shall biennially, on the first day of January, fill such vacancies by the appointment of three members. Each member of said Board shall be a citizen at least thirty years of age and otherwise qualified to vote and no member

shall at the time of his appointment, or during the term of his service, be engaged as a professional educator."

This Act was approved July 3, 1929. Its terms are clear and explicit and admit of no doubt. Of the first Board of nine members to be appointed, the terms of three members expired on January 1, 1931, the terms of the next three members expired on January 1, 1933, and the terms of the remaining three members shall expire on January 1, 1935. In determining the date of expiration of the terms of those members named by you, the only question left for consideration is the date of their appointment and the designation of the terms for which they were to serve. The 1928 election register of the Secretary of State shows the following:

"	Appointed	Confirmed	Term Expires
Mrs. Noyes D. Smith	9- 6-29	2-6-30	6 years
Mrs. Minnie Fisher Cunningham	9- 6-29	2-6-30	
No date of qualification or commission,			
Nat Washer	9- 6-29	2-5-30	6 years
F. L. Henderson	9- 6-29	2-6-30	6 years
Ben F. Tisinger	9- 6-29	2-5-30	4 years
C. H. Chernosky	9- 6-29	2-6-30	4 years
J. W. O'Banion	9- 6-29	2-6-30	2 years
T. E. Jackson	9- 6-29	2-6-30	2 years
Notation: Resigned			
Tom Garrard	9- 6-29	2-6-30	4 years
Mrs. J. E. Watkins	9-11-29	2-6-30	2 years
J. O. Guleke	1-27-30	2-6-30	Vice-Jackson
J. O. Guleke	12-23-30	1-1-31	1937
Mrs. J. E. Watkins	12-23-30		1937

The 1930 election register carries forward the names of Tisinger, Chernosky and Garrard, and under the column heading "Term Expires", carries this notation for each of these three gentlemen:

"4 years

1-1-33."

On examination of the files in the office of the Secretary of State, I find that on September 6, 1929, Hon. Dan Moody, Governor, addressed to Mrs. Jane Y. McCallum, Secretary of State, a letter notifying the Secretary of State of the appointments of Messrs. Washer, Henderson, Jackson, Tisinger, Chernosky, Garrard, O'Banion and Mrs. Smith to membership on the State Board of Education. Under date of September 11, 1929, a similar letter was forwarded containing notice of the appointment of Mrs. J. E. Watkins to membership on the State Board of Education. By official letter bearing date of October 5, 1929 signed by Governor Moody, addressed to Mrs. Jane Y. McCallum, Secretary of State, and found in the archives of the office of the Secretary of State, in the file of appointments, confirmations, and resignations for 1929, Governor Moody designated terms for the members of the State Board of Education, shortly theretofore appointed by him, in the following language:

"I have designated the following terms for the members of the State Board of Education:

"Hon. J. W. O'Banion.....	2 year term
Hon. T. E. Jackson.....	2 year term
Mrs. J. E. Watkins.....	2 year term
"Hon. Ben F. Tisinger.....	4 year term
Hon. Tom Garrard.....	4 year term
Hon C. H. Chernosky.....	4 year term
"Hon. Nat Washer.....	6 year term
Hon. F. L. Henderson.....	6 year term
Mrs. Noyes D. Smith.....	6 year term"

The statute prescribes no manner of fixing the terms of the members of the State Board of Education. We are of the opinion that the Governor making the original appointments had the right and power to designate the terms for which the appointees on the original board should serve. *State vs. Williams*, 222 Mo. 268, 121 S. W. 64; 46 C. J. 965.

Section 3 of the Act creating the State Board of Education as now constituted (Ch. 10, Gen. Laws, 2nd C. S., 41st Leg.) reads as follows:

"The State Board of Education shall organize by the election of one of its members as President, and the State Superintendent of Public Instruction shall be ex-officio secretary of the board."

The statute providing for the organization of the State Board of Education at its original meeting contains no directions relative to the selection of the terms for which the members should serve. This strengthens our conclusion that the Governor making the original appointments had the right and power to designate the terms for which the newly appointed members should serve. Hon. F. L. Henderson, a member of the State Board of Education since its organization, informs us that no attempt was made by the members of the Board at any of their meetings to cast lots or to fix for themselves the dates of expiration of their terms but that on the contrary the members of the Board accepted the designation made by Governor Moody in the official letter heretofore mentioned.

The 1930 election register shows that when Mrs. J. E. Watkins' term expired on January 1, 1931, in accordance with the statute and with Governor Moody's designation of her term as one of the two year terms, she was reappointed for a full six year term. The same is true of Hon. J. O. Guleke, who was originally appointed January, 1930, to succeed T. E. Jackson, who had resigned. Jackson was one of those members whose term had been designated as a two year term and on expiration of that term J. O. Guleke was reappointed and was confirmed for a full six year term ending in 1937. J. W. O'Banion, who was designated for the third two year term, was succeeded by Ernest Alexander in 1931.

It is clear from the terms of the statute that the terms of three of the members expired on January 1, 1933. Since, by the letter of October 5, 1929, Ben F. Tisinger, C. H. Chernosky and Tom Garrard were designated for the four year term and since that designation by the Governor was accepted by the State Board of Education

and has been heretofore followed as to those three members designated for the two year term, such designation will govern the date of expiration of the terms of Messrs. Tisinger, Chernosky and Garrard.

We are, therefore, of the opinion that the terms of Messrs. Ben F. Tisinger, C. H. Chernosky and Tom Garrard, as members of the State Board of Education, all expire on January 1, 1933.

In your last question, which is quoted above, you asked my opinion as to the power of Governor holding office as Governor on the date of the expiration of the terms of office of the above named members to reappoint them or to name their successors. This question is settled by the statute in language so clear as to admit of no doubt and in words which call for no rule of interpretation. Section 1 of the Act creating the Board states that, after the first Board, the term of each member shall be for six years from the date of the respective appointments and "the appointments shall be made and the terms arranged in such manner that three of said members shall retire on the first day of January biennially and the Governor shall biennially, *on the first of January*, fill such vacancies by the appointment of three members." (Underscoring ours).

The statute, by express terms, settles the fourth question asked by you in your resolution No. 11. Governor Sterling on January 1, 1933, had the right, power and express duty under the statutes, of reappointing or naming the successors of the three members whose terms expired on January 1, 1933. The power, right and duty of naming these members did not terminate on that day, however, but was a continuing right and duty which would arise on January 1, 1933, and would continue until the appointments had been made.

Yours very truly,

JAMES V. ALLRED,
Attorney General of Texas.

Op. No. 2910

PUBLIC OFFICERS—GOVERNOR—NOMINATIONS
WITHDRAWAL FROM SENATE.

1. After names of appointees to public office have been submitted to the Senate for its confirmation or rejection, such names may not be withdrawn by the Governor without the consent of the Senate but may be withdrawn with the consent of the Senate.

2. A change in the person of the occupant of the Governor's office does not alter the rule. The executive power is continuous and its scope does not change with the change in Governors.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, January 21, 1933.

Honorable Will M. Martin, Chairman, Senate Committee on Nominations of the Governor, Forty-third Legislature, Austin, Texas.

DEAR SIR: Your inquiry of the nineteenth instant reads as follows:

"Before Governor Sterling left the office of Governor, on or about January 11th, 1933, he sent a message to the Senate advising the Senate of his

appointment of three members to the State Board of Education. Before the Senate acted upon these appointments Governor Ferguson sent the Senate a message requesting that she be permitted to withdraw these three names.

"I have been requested as chairman of the committee on Governor's nominations to call upon you today for an opinion as to whether or not Governor Ferguson has a legal right to withdraw these three names either with or without the consent of the Senate.

"The foregoing history with reference to these appointments is shown in the Senate Journal."

In logical sequence, we will determine: (1) Whether Governor Miriam A. Ferguson has the legal right to withdraw from the consideration of the Senate, *without* its consent, the names mentioned; and (2) if she has not that power, whether she has the legal right to withdraw such names *with* the consent of the Senate.

Under date of January 16, 1933, upon request of the Senate, I advised that the terms of the Honorable B. F. Tisinger, C.H. Chernosky, and Tom Garrard, as members of the State Board of Education, expired on January 1, 1933; and that the retiring Governor Ross S. Sterling, had the legal right to make appointments to fill the three regular terms on said Board which began on January 1, 1933. It necessarily follows from that opinion that the reappointments of Tisinger, Chernosky, and Garrard were valid, in so far as a Governor could make them so; and that those appointments were properly before the Senate for its consideration before Her Excellency Miriam A. Ferguson, succeeded to the Governorship on January 17, 1933.

All constitutional and statutory provisions for the State Board of Education and the manner of appointment of its members are set forth in the opinion of the 16th instant, which is found printed in the Senate Journal of January 17, 1933, Senate Jour. 43rd Leg., Reg. Ses., p. 72). Without here repeating all of those provisions, it suffices to say that the Legislature, acting under proper constitutional grant of authority (Constitution, Art. VII, Secs. 8 and 16), has provided that the members of the State Board of Education shall be appointed by the Governor, **with the advice and consent of the Senate**, (Ch. 10, Gen. Laws, 2nd C. S. 41st Leg., 1929).

It will be noted that the powers of the Governor and the Senate are co-equal, as respects appointments of this nature. The Governor alone may nominate, and in the making of the nominations the Governor needs no senatorial consent. Senatorial consent is required for the appointments, after the nominees for membership on the Board are first selected. (See *Myers vs. United States*, 272 U. S. 52, at 265; 71 Law. Ed. 160, at 228). When the Governor selects his nominees for membership he appoints these nominees, with the consent of the Senate. In the instant case the Governor has both nominated and appointed, and the names of the three appointees under consideration have been referred to the Senate Committee on Governor's Nomination. Sen. Jour., Reg. Ses. 43rd Leg., p. 20.

All of this was done before the attempted withdrawal of the gubernatorial appointments from senatorial consideration. It is our opinion that this matter had passed from the hands of the Governor and into

the control of the Senate before the recall was attempted. *Barett vs. Duff*, 114 Kan. 220, 217 Pac. 1918. It is immaterial that there was a change in Governors after the appointments were sent to the Senate and before the recall was attempted. The executive power vested in the Governor *is continuous and knows neither names, person, nor terms of office*. It began with the Revolution and establishment of an independent government for Texas, and will continue so long as our Constitution endures. *Barrett vs. Duff*, 114 Kan. 220, 217 Pac. 918; *State vs. Mastassarini*, 114 Kan. 224, 217 Pac. 930; *People vs. Shower*, 30 Wyo. 366, 222 Pac. 11. The power of appointment of the members of the State Board of Education began with the amendments to the Constitution adopted in 1928, and the Legislative Enabling Act of 1929, *supra*. It has extended in unbroken lines since that date, and will exist so long as these constitutional and statutory provisions remain unchanged.

After appointment by the Governor neither the appointing Governor nor his successor has any power over the appointment, in the absence of *senatorial* acquiescence. *Barrett vs. Duff*, *supra*. The mere fact that the appointing Governor has been succeeded in office by another does not deprive *the Senate* of its *confirming power* over appointments made by the retiring Governor. *People vs. Shower*, *supra*.

To show that the Governor could withdraw these nominations against the will of the Senate would be to destroy the *co-equal power* of the Governor and the Senate over such nominations. Such a rule would reduce the Senate to the status of a mere ministerial body, would ignore its co-equal power and responsibility, would cripple its appointive powers, and would be destructive of our traditionally weighted American governmental system of checks and balances.

While I have cited other cases in this opinion, I regard this question as settled by the great Chief Justice in the classic case of *Marbury vs. Madison*, 1 Cranch 137, 2 Law. Ed.60. That case has been regarded for more than a hundred years as the leading and most important ever decided on the question under consideration. In discussing the power of the executive over appointments, Chief Justice Marshall said:

"The power of nominating to the Senate, and the power of appointing the person nominated, are political powers, to be exercised by the President according to his own discretion. When he has made an appointment, he has exercised his whole power, and his discretion has been completely applied to the case. If, by law, the officer be removable at the will of the President, then a new appointment may be immediately made, and the rights of the officer are terminated. But as a fact which has existed cannot be made never to have existed the appointment cannot be annihilated; and consequently, if the officer is by law not removable at the will of the President, the rights he has acquired are protected by the law, and are not resumable by the President. They cannot be extinguished by executive authority, and he has the privilege of asserting them in like manner as if they had been derived from any other source."

The first point covered in your inquiry is, therefore, settled by this quotation. The second inquiry is likewise governed by the same

case. Under the terms of the Act creating the State Board of Education, *senatorial confirmation* is required before the appointments becomes final. Until an appointment becomes final so that the appointee is legally entitled to the office, it is subject to revocation by the *appointing power*. *Marbury vs. Madison*, 1 Cranch 137, 2 law. Ed. 60; *Schulte vs. City of Jefferson*, 273 S. W. 170 (Kan. City Ct. of App.); *Board of Education of Boyle County vs. McChesney*, 235 Ky. 692, 32 S. W. (2d) 26.

Since the appointment of Messrs. Tisinger, Chernosky and Garrard have not been made final by confirmation, the *appointing power* has the right to recall their appointment. In this case the *appointive power* is vested *jointly* in the *Governor and the Senate*; and if the Senate gives its *consent* to the withdrawal, it thereby joins in the recall and the names of those submitted may unquestionably be withdrawn.

You are, therefor, respectfully advised that Governor Ferguson has not the legal right to withdraw the names of the three appointees without the consent of the Senate. It necessarily follows that she may do so with the consent of the Senate.

Very truly yours,

JAMES V. ALLRED,
Attorney General of Texas.

Op. No. 2911.

DISTRICT ATTORNEYS—FEES OF OFFICE—SALARIES, DISTRICT ATTORNEYS—ARTICLE 1021, C. C. P. CH. 236, ACTS 40TH LEG.—CHAPTER 66, 41ST LEG. 2ND AND 3RD C. S., 1929—CONSTITUTIONALITY APPROPRIATIONS—REPEAL OF STATUTES.

1. Legislature can not place district attorneys upon salary basis other than the salary of \$500.00 provided by Constitution; any additional compensation can only be allowed by way of "fees, commissions and perquisites".

2. Ch. 236, Acts 40th Leg., 1927, p. 350, construed and held to fix salary of district attorneys in districts composed of two or more counties at \$20.00 per day based upon necessary attendance upon court and discharge of certain duties.

3. Per diem of \$20.00 per day allowed district attorneys by Ch. 236, Acts 40th Leg., supra, held not to be a "salary" but a "fee" conditioned upon necessary performance of certain services.

4. Ch. 236, 40th Leg., 1927 (now Art. 1021, C. C. P.), held constitutional

5. Ch. 66, p. 134, Gen. Laws, 41st Leg., 2nd and 3rd C. S., 1929 attempting to change basis of compensation from per diem to flat sum of \$10.00 per day for first 350 days of every calendar year held to be unconstitutional because, in effect, a salary additional to constitutional salary of \$500.00

6. A valid and existing law can not be repealed by an unconstitutional enactment; held Ch. 66, Acts 41st Leg., 2nd and 3rd C. S., supra, did not repeal Ch. 236, Acts 40th Leg., 1927, supra.

7. That portion of Ch. 95, Acts 42nd Leg., 1931, attempting to appropriate \$182,000.00 for "District Attorneys compensation and per diem—fifty-two attorneys—\$10.00 per day for each of 350 days of calendar year" held invalid.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, February 4, 1933.

*Honorable George H. Sheppard, Comptroller of Public Accounts,
Austin, Texas.*

DEAR SIR: Your letter of February 2nd reads as follows:

"I will thank you to advise this department as to whether or not the pay of district attorneys in judicial districts composed of two or more counties is controlled by the provisions of your opinion dated January 30, 1933, addressed to the Senate Investigating Committee and carrying your number 2907."

This department's opinion number 2907, dated January 30, 1933, referred to in your letter, was in response to an inquiry from the Senate Investigating Committee as to whether the Legislature, if it saw fit, could place certain officers, including district attorneys, on a salary basis in lieu of all fees. The opinion holds, in substance, that the Legislature could not place district attorneys on a salary basis (other than the salary of \$500.00 provided by the Constitution); and that any additional compensation could *only* be allowed by way of "fees, commissions and perquisites."

The compensation of district attorneys in judicial districts composed of two or more counties was fixed by Ch. 236, Acts of the 40th Legislature, 1927, p. 350, reading as follows:

"District Attorneys in all judicial districts composed of two counties or more, shall receive from the State as pay for their services the sum of \$500.00 per annum, and in addition thereto, shall receive from the State as pay for their services, the sum of \$20.00 for each day they attend the Session of the District Court in their respective districts in the necessary discharge of their official duties, and \$20.00 for each day used in necessarily going to and coming from the District Court in one county to the District Court in another county in their respective districts in the necessary discharge of their official duties, and in attending any Session of said Court; and \$20.00 per day for each day they represent the State at examining trials, inquest proceedings and habeas corpus proceedings in vacation; said \$20.00 per day to be paid upon the sworn account of the District Attorney, approved by the District Judge, who shall certify that the attendance of said District Court for the number of days mentioned in his account was necessary, after which said account shall be recorded in the Minutes of the District Court; provided that the maximum number of days for which compensation is allowed shall not exceed one hundred and seventy-five days in any one year. All commissions and fees allowed District Attorneys under the provisions hereof, in the districts composed of two or more counties, shall, when collected, be paid to the District Clerk of the county of his residence, who shall pay the same over to the State Treasurer."

This quoted act of the 40th Legislature amended Ch. 173, Acts 39th Legislature, 1925, p. 406. The only substantial difference between the Acts of 1925 and 1927 was in the maximum number of days for which compensation might be allowed, and the amount of compensation per day.

It will be observed that by the act of 1927 the compensation of district attorneys (in addition to the constitutional salary of \$500.00), was fixed at \$20.00 per day, based upon the number of days they at-

tended the sessions of the district courts in their respective districts in the *necessary* discharge of their official duties, and the same amount for each day used in *necessarily* going to and coming from the district court in one county to the district court in another county in the *necessary* discharge of their duties; and a like sum for each day *necessarily* spent in representing the state at examining trials, inquest proceedings and habeas corpus proceedings in vacation. This per diem allowance of \$20.00 per day was *conditioned* upon the discharge of these duties, the attendance of the district attorney upon the court and the *necessity* for such attendance. In other words, the district attorney was not entitled to receive this sum of \$20.00 per day irrespective of his discharge of the duties or of his attendance upon the court, or of the necessity of same.

We think it may be safely said that this \$20.00 per day is a compensation or reward for particular services rendered at irregular periods, payable only in event the services are rendered. It is therefore additional compensation in the form of a "fee" for each day of actual necessary service. (See conference op. Atty. General's Dept. No. 2907, *supra*). Certainly this compensation can not be said to be "salary," since it was not provided as a periodical and regular payment dependent upon time but, on the contrary, is contingent upon the performance of certain services and necessary attendance upon the court.

The act of 1927 (Ch. 236, 40th Leg., p. 350) has been carried forward in Vernon's Annotated Criminal Statutes as Article 1021 of the Code of Criminal Procedure. Since the additional compensation therein allowed to district attorneys is not provided for by way of "salary" but rather as "fees" for particular services, we hold this act to be in all things constitutional.

In 1929, however, the 41st Legislature attempted by the passage of Senate bill 121, (Ch. 66, p. 134, Gen. Laws 41st Leg., 2nd and 3rd C. S., 1929), to change the basis of compensation of district attorneys in judicial districts composed of two or more counties by providing as follows:

"Section 1. District Attorneys in all Judicial Districts composed of two or more counties, shall receive from the State as pay for their services, the sum of \$500.00 per annum as provided by the Constitution, and in addition thereto, and in lieu of the fees, commissions and perquisites provided by law, shall receive from the State the sum of \$10.00 for each of the first three hundred fifty days of every calendar year as compensation for attending examining trials, Habeas Corpus hearings, the sessions of the District Court of the District they represent, and for performing such other duties as imposed by law. The compensation provided for in this Act shall be paid monthly by the State upon warrants drawn by the Comptroller of Public Accounts, and it shall not be necessary for the District Attorney to file any account with the District Judge or the Comptroller of Public Accounts. Nothing in this Act shall be construed so as to deprive District Attorneys of the expense allowance now provided by law, nor shall this Act effect the salary or compensation of any District Attorney fixed by special law. All commissions, perquisites and fees allowed to and collected by District Attorneys in Districts composed of two or more counties shall be paid to the District Clerk of the county of his residence, who shall pay the same over to the State Treasury."

This Act of 1929 sought to change the basis of compensation from a per diem, dependent upon the performance of services and necessary attendance upon the court, to a fixed sum of \$10.00 per day for the first 350 days of every calendar year. This compensation was to be paid *monthly*, by warrants drawn by the Comptroller of Public Accounts without even the necessity of the filing of accounts by district attorneys. It was and is nothing more than the payment of a flat salary of \$3,500.00 per year, to be paid irrespective of necessary attendance upon court or of the number of days required of the district attorney to discharge the duties imposed upon him by law. It was, in other words, "a periodical payment dependent upon time," and falls, therefore, clearly within the definition of the word "salary" set out in department opinion 2907, *supra*.

You are, therefore, advised that, in our opinion, Senate bill 21 (Ch. 66, Acts 41st Leg. 2nd and 3rd C. S. 1929, p. 134) is unconstitutional.

This act of 1929, however, did not attempt to expressly repeal Article 1021, C. C. P. (Acts 1927, 40th Leg., p. 350, Ch. 236). The rule is elementary that a valid, existing law can not be repealed by an unconstitutional enactment. Since the act of 1929 (S. B. 21, Ch. 66, Acts 41st Leg., 2nd and 3rd C. S., p. 134) was clearly unconstitutional, and since it did not attempt to repeal Article 1021, C. C. P., *supra*, the former act (of 1927) is, therefore, in full force and effect. *Ex parte Heartsill*, 38 S. W. (2d) 803.

You are, therefore, advised that the "additional compensation" of district attorneys in all judicial districts comprising two or more counties is definitely fixed by the provisions of Article 1021, C. C. P., *supra*, at \$20.00 per day for not exceeding 175 days of *necessary* attendance and service in any one year. Your attention is particularly directed to the provisions of this law as to the requirements for the filing and approval of accounts of the district attorney.

Our investigation of the matters submitted in your letter of February 2nd discloses another serious question. Chapter 95, Acts 42nd Leg., 1931, making appropriations for the operation of the judicial department, attempted to appropriate \$182,000.00 for the fiscal year ending August 31, 1933, to pay the compensation (additional to the \$500.00 constitutional salary) of fifty-two district attorneys. (See p. 147, Acts 42nd Leg., 1931). This particular appropriation reads as follows:

"District Attorneys compensation and per diem: Fifty-two attorneys, \$10.00 per day for each of 350 days of calendar year—\$182,000.00."

This attempted appropriation was clearly based upon an unconstitutional act (Ch. 66, Acts 41st Leg. 2nd and 3rd C. S., 1929). In fact this appropriation itself limits these district attorneys to \$10.00 per day for 350 days, automatically allowing them only one-half of the sum to which they will be entitled for a day of actual and necessary service and attempting to authorize compensation for just twice as many days as that to which they were entitled. In round numbers, of course, the result is the same; but in view of our holding that the act of 1929 is unconstitutional, and of the peculiar language employed in this attempted appropriation, we are inclined to the belief

that the appropriation itself is invalid. We have so advised a number of district attorneys in person, and have drawn at their request a bill, making an emergency appropriation to pay them for the remainder of the fiscal year under the act of 1927.

It is our understanding that the bill will be promptly introduced in the Legislature, but until this emergency appropriation is actually made you are respectfully advised that there is no appropriation other than for the salary of \$500.00 each per year for district attorneys in districts composed of two or more counties.

Very truly yours,

JAMES V. ALLRED,
Attorney General of Texas.

Op. No. 2913

PUBLIC OFFICERS—TERM—STATE RECLAMATION ENGINEER.

1. Where a statute creates an office and prescribes the length of the term without fixing the date of the beginning or termination of the term, the term begins to run from the date of the first appointment and all subsequent terms will begin on that same date, unless a different time for ending of the term is prescribed by the appointive power at the date of making the first appointment.

2. The first appointment to the office of State Reclamation Engineer on July 1, 1913, fixed the beginning of the two year term, and all subsequent terms begin on that date.

3. An appointment made on February 6, 1931, entitled the appointee to hold office for the unexpired term only, which term expired on July 1, 1931.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, February 24, 1933.

Hon. W. W. Heath, Secretary of State, Capitol Building, Austin, Texas.

DEAR MR. HEATH: Receipt is acknowledged of your recent letter, reading in part as follows:

"Article 7960 of the Revised Civil Statutes of 1925 reads as follows:

"The Governor shall biennially appoint a State Reclamation Engineer, with the advice and consent of the Senate."

"This seems to be the only Statutory provision as to the term of office of said engineer.

"It appears that this act was passed in 1913. From an examination of the records in the office of the Secretary of State, I find that the first State Reclamation Engineer was appointed on July 1st, 1913; qualified July 2nd, 1913, and was confirmed by the Senate on August 13th, 1913.

"The present State Reclamation Engineer was appointed first on January 28th, 1929, and was confirmed by the Senate on the same day, and qualified as such.

"This man was re-appointed by former Governor Sterling on February 6th, 1931, confirmed by the Senate on February 11th, 1931, but, it appears from the records that he has never taken the oath of office or qualified upon the last named appointment and confirmation, but, has merely been holding over without taking the oath of office. I desire to submit to you the following question:

"WHEN DOES, OR WHEN DID, THE TERM OF OFFICE OF THE PRESENT STATE RECLAMATION ENGINEER EXPIRE?"

"It is my opinion that in view of the fact that the Statute does not state the beginning date of the term, but, makes a term of two years, that the term would begin with the appointment of the first State Reclamation Engineer, which was on July 1st, 1913, and would end on July 1st, of every second year thereafter.

"Therefore, when the present Reclamation Engineer's appointment was sent to the Senate for confirmation on January 28th, 1929, that it was for the un-expired term ending July 1st, of that same year; and, that he held over from July 1st, of that same year until February 6th, 1931, by reason of the Constitutional provision saying that all officers shall continue to discharge their duties of office until their successors are duly qualified.

"In the event that you hold that the term does not begin on July 1st, but, at some other date, I would like to know what date the term of the present incumbent expires.

"You will note that he was appointed the first time January 28th, 1929, and the second time, February 6th, 1931, and has served more than four years in all."

The office of State Reclamation Engineer was created by the Thirty-third Legislature in 1913, the Act creating such office taking effect on June 30, 1913. The provision for the appointment of the State Reclamation Engineer made in said Act reads as follows:

"The said State Reclamation Engineer shall be appointed by the Governor with the advice and consent of the Senate, and shall serve for a term of two years and until his successor is appointed and qualified." Section 5, Chapter 145, General Laws, 33rd Legislature, 1913.

Following the submission of your request for an opinion I requested and received from you statement from the records of your office showing the dates of the appointments, confirmations, qualifications and commissions of the various State Reclamation Engineers who have been appointed since the effective date of the Act creating said office. The list furnished by you is as follows:

<i>Name</i>	<i>Appointment</i>	<i>Confirmation</i>	<i>Qualification</i>	<i>Com.</i>
Arthur A. Stiles	7- 1-13	8-13-13	7- 2-13	8-21-13
Arthur A. Stiles	1-21-15	1-16-17	2-15-15	2-15-15
Arthur A. Stiles	1-17-17	2-10-17	2-14-17	2-23-17
Arthur A. Stiles	1-21-19	1-17-19	1-23-19	1- 8-19
Arthur A. Stiles	1-18-21	1-20-21	-----	1-31-21
Arthur A. Stiles	2-20-23	3-12-23	2-27-23	2-27-23
B. F. Williams	2- 9-25	2-14-25	2-13-25	2-13-25
B. F. Williams	6- 7-27	6- 7-27	7- 6-27	7- 6-27
B. F. Williams	1- 7-29	1-17-29	1-28-29	1-28-29
B. F. Williams	2- 6-31	2-11-31	-----	-----

It will be noted that the first appointment under this Act was made on the first day of July, 1913. All subsequent appointments were made either in January or February, with the exception of the second appointment of Mr. Williams, present State Reclamation Engineer, which appointment was made on the 7th day of June, 1927. The 1925 revision of the Statutes made no essential change in the Act of 1913, but carried forward in condensed form the provision of the original act. The present statutory regulation concerning this office is found in Article 7960 of the Revised Civil Statutes of Texas, 1925, which is quoted above in your letter.

Since this department has heretofore, in two separate conference opinions, passed upon the question of law presented by you in your

inquiry, I do not deem it necessary to enter into an extensive quotation of authorities. Reference is here made to the Report of the Attorney General, 1914-1916, page 736, and to Opinion No. 2572, dated November 19, 1924, appearing at page 344 of the Report of the Attorney General, 1924-26. The former opinion was written by Hon. W. A. Keeling, Assistant Attorney General, during the administration of Judge B. F. Looney, while the latter opinion was written by Assistant Attorney General L. C. Sutton during the administration of Hon. W. A. Keeling as Attorney General. The first opinion dealt with the appointment of a county health officer by the county commissioners' court, while the second opinion defined the term of office of the State Game, Fish and Oyster Commissioner. It was held in both opinions that the term of office of an appointee begins to run from the date of the appointment where the Statute fixes the length of the term but does not fix the date of beginning or the date of termination of the term. In case an office be created for a certain term of years but the Act creating same fixes no date of beginning or ending of the term, the term is fixed by the date of the first appointment. The date of qualification is immaterial in fixing the term because should the date of qualification control it would be within the power of the officer appointed to prolong his term by failure to qualify with diligence.

From a study of the cases it seems that there is an exception to the well settled rule in cases where the appointive power in making the first appointment designates the date of the beginning and the date of the ending of the term. I have examined the Senate Journals of the Thirty-third Legislature and find that neither the Governor's message submitting the name of Arthur A. Stiles as first State Reclamation Engineer, nor the Senate's action in confirming the same, attempted to fix any date for the beginning or expiration of the term of office. That being the case, the general rule of law would control, and the term of office of the State Reclamation Engineer would be fixed for a period of two years, beginning July 1st, 1913. Each succeeding term would begin on July 1st of odd numbered years.

Mr. Williams' appointment on the 6th day of February, 1931, was for the unexpired portion of the term ending July 1, 1931. Since July 1, 1931, Mr. Williams has been holding over and will be entitled to hold the office only until his successor is appointed and has qualified.

Since the numerous authorities applicable to this situation have been carefully reviewed in the two former opinions of this department, I deem it to be unnecessary to repeat them here, and will not unnecessarily prolong this opinion with a quotation of that which has been heretofore settled by long continued construction.

Very truly yours,

JAMES V. ALLRED,
Attorney General of Texas.

Op. No. 2915

PUBLIC OFFICERS—HIGHWAY COMMISSION—DE FACTO OFFICER—
ISSUANCE OF WARRANTS ON HIGHWAY FUND BY
STATE COMPTROLLER.

1. All vouchers submitted to the Comptroller of Public Accounts as a basis for issuance of warrants against the State Highway Fund must be approved by a majority of the Highway Commission, including the chairman of the Commission.

2. Where there is a dispute over the legal right and title of Chairman of the Highway Commission, the approval of vouchers by the Chairman de facto is sufficient approval under Article 6694, R. C. S. 1925, where such vouchers are also approved by one other member of the Commission.

3. Facts surrounding claim of F. L. Denison to title of Chairman of the Highway Commission reviewed. Held that W. R. Ely, having remained in possession of office is at least de facto Chairman of the Highway Commission.

4. Approval of vouchers drawn as a basis for issuance of warrants on the State Highway Fund by W. R. Ely, as chairman of the Highway Commission, and D. K. Martin, as a member, is sufficient to authorize the Comptroller to issue warrants, and said vouchers need not be approved by F. L. Denison.

5. State Treasurer is authorized to pay warrants drawn by the State Comptroller in accordance with this opinion.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, March 3, 1933.

Hon. George H. Sheppard, Comptroller of Public Accounts, Austin, Texas.

DEAR SIR: Your inquiry of the 25th ultimo reads as follows:

"In view of recent developments over the appointment of Frank L. Denison as a member of the State Highway Commission; and

"In view of the fact that Mr. Denison has filed his bond, as Highway Commissioner, properly approved by the Governor; and

"In view of the fact that Mr. Denison came to this department in person this morning showing me his commission of appointment as Chairman of the Highway Commission, notifying me that all claims from the Highway Department must bear his approval;

"Am I as Comptroller authorized under the law to issue any further warrants upon claims presented by the Highway Department without the approval of Mr. Denison as Chairman of the Highway Commission?"

Article 6694, R. C. S., 1925, reads as follows:

"All funds coming into the hands of the Commission derived from the Registration fees or other sources provided for in this subdivision, as collected, shall be deposited with the State Treasurer to the credit of a special fund designated as 'The State Highway Fund,' and shall be paid only on warrants issued by the Comptroller upon vouchers drawn by the chairman of the Commission and approved by one other member thereof, such vouchers to be accompanied by itemized sworn statements of the expenditures."

Under this article all vouchers submitted to the Comptroller of Public Accounts as a basis for issuance of warrants against the State Highway Fund must be approved by a majority of the Highway Commission, including the Chairman of the Commission. In discussing

the duties of the State Treasurer under this article, the Supreme Court had the following to say :

"It is true that the state treasurer actually pays out the money on deposit to the credit of the highway department, as is generally the case with all obligations made by a state department for and on behalf of the state. He does this, however, as a mere disbursing officer *and on vouchers issued and approved by a majority of the highway commission*. He has no discretion in paying claims of contractors *when they are properly approved by the highway commission*." (Italics ours) Smith vs. Texas Co., 50 S. W. (2d) 774.

In answering your inquiry, it is only necessary to determine whether the quoted statute as construed by the court is complied with when vouchers are presented which do not bear the signature of Mr. Denison as Chairman of the Highway Commission. You do not ask whether or not the commission presented to you by Mr. Denison is in fact a valid commission, and I do not deem it necessary to pass on that point in order to answer your question.

It is a well known fact that both W. R. Ely and D. K. Martin are duly appointed and qualified highway commissioners, and together constitute a majority of the board. It is also a well known fact that W. R. Ely has been the duly designated and acting chairman of that Commission for more than two years, and under well known constitutional and statutory authority, will continue to serve as Chairman until there has been a designation of a duly and legally qualified highway commissioner to succeed him in the chairmanship.

The term of Hon. Cone Johnson as a third member of the Highway Commission expired February 15, 1933. On February 1st and 8th, 1933, Governor Miriam A. Ferguson submitted the name of F. L. Denison to the Senate for confirmation as a member of the Highway Commission to succeed Hon. Cone Johnson, and designated him to act as Chairman. (S. J. p. 154 and 196). On February 8th the Senate, in executive session, refused to confirm this nomination and recorded its action in the Journal (S. J. p. 199). On February 9th Governor Ferguson again submitted Denison's name (S. J. p. 209), and on February 23, 1933, the Senate, in executive session, again refused to confirm (S. J. p. 474). Following the second rejection and the official entry of the same on the Journal, Governor Ferguson requested the Senate to advise her as to the vote by which the rejection was had (S. J. p. 535), and on February 28, 1933, the Senate refused to give this information to the Governor (S. J. p. 625).

On February 24, 1933, after the second rejection by the Senate, Governor Ferguson issued to Mr. Denison a commission of appointment as Chairman of the Highway Commission, duly attested by the Secretary of State. We assume that this was the commission displayed to you by Mr. Denison.

After receiving the aforementioned commission, Mr. Denison issued a call for a meeting of the Highway Commission to be held in Austin on Monday, February 27, 1933. The majority of the Commission failed and refused to attend; and I am informed by Mr. Ely that he does not recognize Mr. Denison as Chairman but, on the contrary, contends that Mr. Denison has not been confirmed by the Senate and that he, Ely, is the Chairman of the Highway Commission, and will

continue to hold that title until a legally qualified Highway Commissioner is designated to succeed him. Mr. Ely further states that he has not surrendered the books, papers and documents to Mr. Denison as Chairman, required to be delivered to his successor by Article 18, R. C. S., 1925, but that, on the contrary, he claims the title and exercises the prerogatives of Chairman, and his claim is recognized by the other member, D. K. Martin.

Because of the question that has been raised as to the legality of his appointment as a member and Chairman of the Highway Commission, Mr. Denison on February 28th requested an opinion of the Attorney General's Department; but on March 1st his request for this opinion was qualified by the statement of his counsel that such opinion should be based upon the assumption that he (Denison) received a majority vote for confirmation. We declined to indulge in such assumption for the reason that the only legal record available is the Senate Journal and the message to the Governor, which show that Denison was rejected. In view of the fact that the Senate had refused to furnish the Governor with the vote (S. J. p. 625), and in view of the rules of the Senate as to executive sessions we did not feel at liberty to make an admission which we had no means of knowing to be true.

We are today in receipt of a letter from Mr. Denison's counsel in which he has assented to the institution of a test suit in the nature of a quo warranto, which will be filed immediately. In the meantime, however, the orderly administration of the important business of the Highway Department demands that your inquiry of the 25th be answered, thereby enabling you to perform your official duties in connection with the issuance of warrants based upon vouchers of the Highway Department until the final determination of such suit.

Under this statement of facts it is unnecessary for me to attempt to pass upon the validity of the commission issued to Mr. Denison, for the facts show that Mr. Ely is at least de facto Chairman and as such his public acts will be held valid in respect to the public whom he represents and to third persons with whom he deals officially.

Biencourt vs. Parker, 27 Tex. 558, at 563;

Shriber vs. Culberson, 31 S. W. (2d) 659;

Rockingham County vs. Luten Bridge Co., 35 Fed. (2d) 301, C. C. App. 4th Cir. (Justice Parker).

Commonwealth vs Snyder, 144 Atl 748, (Sup. Ct. Pa.)

22 R. C. L. 601;

Mecham On Public Offices and officers, Sec. 327;

46 Corpus Juris 1060;

Throop on Public officers, Sec. 649.

We do not hold that Ely is not the de jure Chairman of the Highway Commission at this time. Our opinion is that he is at least the de facto Chairman. He may be the de jure Chairman but, irrespective of the legal nature of his occupancy, his public acts are valid so long as he continues to hold the place of chairman, exercises the duties of Chairman, and receives public recognition as Chairman. What shall constitute an officer de facto may admit of doubt in different cases, but it is well settled that where a duly qualified person is duly and legally appointed to an office and qualifies and enters

into the possession thereof and serves for a long period of time, and refuses to surrender the office to a successor whose title is so clouded as to deny that successor the general public acknowledgement usually received by an officer whose title has no defect, such officer so holding over is a *de facto* officer irrespective of the merits of the legal claims of the contestant. 46 C. J. 1055 and 1058; Throop on Public Officers, Sec. 631; 22 R. C. L. 598; Hamlin vs. Kassafer, 15 Ore. 456, 15 Pac. 778.

An officer *de facto* must be in possession of the office, from which it follows that there cannot be two officers *de facto* for the same place because the one office cannot be in legal possession of two men at the same time. In case there be any contest over the point of possession, priority in time is the controlling factor. The leading case on this point, Braidy vs. Theritt, 17 Kansas 468, was decided by the Supreme Court of Kansas in 1877. The laws of Kansas provided for a mayor and council of five for the city of Wathena. One, Theritt, was a member of the city council prior to April 5, 1875, upon which date an election was held to name his successor. Theritt was opposed for re-election by one Braidy. The election resulted in a tie vote. Theritt received the certificate of election, though Braidy claimed to have received the ward of the election judges. On April 13th Theritt took the oath of office as his own successor. A council meeting was called by the mayor for April 20th, which was attended by the mayor, the four uncontested council members, and by both Theritt and Braidy.

The mayor refused to recognize Theritt as a member of the council but recognized Braidy as the fifth member, and Braidy was sworn in as such. Theritt and two regular members retired from the meeting, whereupon the mayor, two regular members and Braidy proceeded to do business as a city council. Theritt sued for an injunction to restrain Braidy from acting as councilman, and Theritt and two others sued to restrain the mayor, the two members and Braidy from acting as the city council. A temporary injunction was granted by the trial court, and Braidy appealed. Since the suit was for injunction, the only question before the court was that of possession, and the Supreme Court of Kansas expressly stated that the only question for it to decide was whether Theritt or Braidy was in possession of the office. The opinion of the court follows:

"Now evidently, Theritt, Selover, and Dockhorn had no intention of abandoning their offices when they retired from the council meeting. They did not intend to create vacancies in their offices, whereby Braidy or any one else could step in and become a member of the council, *de facto*, or otherwise. They simply intended to leave the council without a quorum, so that the mayor and the two members of the council who recognized Braidy's claims could not do any business. Theritt has never abandoned his office. He has never created such a vacancy in his office that any other person could step in and become an officer *de facto*; and therefore Braidy has not become a councilman *de facto*. Or at most, we do not think that he has become such an officer *de facto* that he can receive any benefit therefrom as against the person whom he has illegally attempted to oust from office. As between Braidy and Theritt, Theritt must be considered as the officer *de facto*. It would be strange doctrine to announce, that whenever an officer steps out of the place where he usually does business, that any person who may choose to claim the office may at once step in

and become immediately an officer de facto. *Such a short road to obtain a contested office has never yet been opened. This is not the legal way to obtain the possession of a disputed office.* The only legal remedy in such a case for the party out of office to obtain possession of the same is by a civil action in the nature of a *quo warranto*. We have already held that two persons cannot be officers de facto for the same office at the same time. *McCahon vs. Leavenworth Co.* 8 Kas. 437. And we have also held that the officer de facto is the proper person to hold the office during any contest therefor. *The State vs. Durkee*, 12 Kas. 308, 314.”
(Italics ours).

This opinion, by Justice Valentine, was concurred in by Justice Brewer, later a distinguished Justice of the United States Supreme Court.

Under the known facts and the authorities, we are of the opinion that Ely is indisputably possessor of the office or title of Chairman. Being in possession and holding over under a claim that cannot be said to be without reasonable grounds, he is at least de facto Chairman of the Highway Commission. *Hamlin vs. Kassafer*, 15 Oregon 456, 15 Pac. 778. As such his official acts are valid as to the public and to third persons with whom he deals officially. Under the above cited authorities, he is entitled to continue to act as de facto chairman until replaced by judgment of a court or by peaceful surrender to one whose title is without cloud.

It is a matter of common knowledge that Hon. Cone Johnson, the third member of the Commission, is confined by illness and unable to personally discharge the duties of his office at this time; and that for some time prior to the issuance of the commission by the Governor to F. L. Denison, all vouchers have been drawn by W. R. Ely, as Chairman, and approved by D. K. Martin, as a member. In other words, these vouchers have been drawn and approved “by a majority of the Highway Commission” (*Smith v. Texas Co.*, supra). It is not necessary for us to pass on the question of whether the provision of Article 6694, supra, for vouchers to be drawn by the Chairman is mandatory. Certainly if W. R. Ely continues to draw these vouchers as Chairman of the Commission and same are approved by D. K. Martin as a member of such Commission, there would be a substantial compliance with the statute by a majority of the Commission, and you would be authorized to issue warrants based upon such vouchers. In our opinion, you would incur no liability upon your official bond by such action.

You are therefore advised that it is not necessary at this time for vouchers drawn as herein indicated to be approved by Mr. Denison as Chairman of the Highway Commission before you may legally issue warrants thereon.

I am also in receipt of a communication from Hon. Charley Lockhart, State Treasurer, inquiring whether warrants drawn upon the Highway fund upon vouchers not bearing Mr. Denison’s signature may be paid by him. It follows from what has been said heretofore that warrants issued by you in accordance with this opinion may be paid legally by the State Treasurer.

Very truly yours,

JAMES V. ALLRED,
Attorney General of Texas.

OPINIONS RELATING TO TAXATION

Op. No. 2814

WATER CONTROL AND IMPROVEMENT DISTRICTS—MUNICIPAL CORPORATIONS—TAXATION—LIABILITY—CONSERVATION AND RECLAMATION DISTRICTS—HIGHWAY CONSTRUCTION.

1. Tarrant County Water Control & Improvement District No. 1 is a municipal corporation owning and holding property for public purposes and is not subject to taxation.

2. Where sufficient territory remains in the municipality encroached upon from which to pay its outstanding bonded indebtedness without exceeding its constitutional limitation, the new municipality cannot be taxed to pay any part of such indebtedness.

3. Tarrant County Water Control & Improvement District No. 1 would, as to the railroad, pipe lines, telephone lines and electric power lines, actually be taking such property as its dams and reservoirs would cause to be inundated by water. As to such property, The District must make compensation in such sum as would represent the present cost to reproduce the given property inundated, but no more; the reproduced property to be comparable in character and condition to the property actually inundated. If the District has reasonably exercised the determination to take any given property, as being needed to conserve or promote the public welfare, then the taking represents the lawful exercise of the police power of the State, and there will not be involved any duty to make compensation for consequential, or resulting, expenditures to be made by the respective owners in order to preserve the operation of their facilities and to cause the same to be accommodated to the changed physical conditions.

4. Said Water Control District would not be liable to contribute to the sinking fund of counties, road and other district obligations unless and until it is shown that said Water Control District has so encroached upon the taxable values of such districts as to leave insufficient values within such district for the payment of its indebtedness without exceeding its constitutional limitation.

5. Title to the roads in the several counties and districts is vested in the State of Texas, and said Water Control District could not be compelled to compensate such counties or districts for such roads or parts thereof.

6. Said Water Control District is not authorized to contribute to the construction of highways except and unless the same are a part of the project for which said District is created.

OFFICES OF THE ATTORNEY GENERAL OF TEXAS,
AUSTIN, TEXAS, September 19, 1930.

Board of Directors, Tarrant County Water Control and Improvement District No. 1, Capps Building, Fort Worth, Texas.

GENTLEMEN: The Attorney General, Honorable Robert Lee Bobbitt, received your communication wherein you make a statement of the physical factors involved in carrying out the project of Tarrant County Water Control & Improvement District No. 1, especially with reference to the effect of the plans of the District on the financial status and existing properties of certain other governmental agencies and quasi-public corporation. Accompanying this presentation is a statement of the present claims made against the district by such other corporate creatures. As we construe your communication,

you have presented these matters not only for the district, but as well for and under concurrent desire of the County Commissioners' Court of Tarrant and Wise Counties, Texas, and the school authorities in each of said counties.

Briefly, you state Tarrant County Water Control & Improvement District No. 1 is a body politic, a governmental agency, operating pursuant to Section 59, Article XVI, State Constitution, and its enabling act, Chapter 25, General Laws, 39th Legislature, as amended by the Acts of the 40th and 41st Legislatures; that the water district embraces all of the City of Fort Worth, and 48,000 acres of land outside of the city; that the water district purposes, to exercise all the powers conferred by Section 59, Article XVI, of the Constitution, except one—that of conserving and developing forests; that the water district is now operating pursuant to Section 59, Article XVI, of the State Constitution, and the enabling acts of the Legislature of Texas. You make a detailed statement of the creation and organization of the water district, and the proposals of the water district, not necessary to here relate, from all of which is shown that the water district is a municipality as established pursuant to Sections (a), (b), (c) and (d) of Section 18, Chapter 280, Acts of the 41st Legislature, and other pertinent acts of the Legislature.

The undertaking as shown by you includes the proposal to store water to supply the City of Fort Worth and to irrigate lands in Tarrant and Wise Counties and to supply water to industries located outside of but adjacent to Fort Worth; to hold abnormal waters and to slowly release the same in such manner as to prevent or minimize destruction by water in the Trinity Valley below the water district's works.

You make the following statement:

"The results to grow out of this undertaking, in so far as will be material to consideration of the questions propounded herewith are: (1) There are four independent school districts which include areas of land acquired, or to be acquired, by the district, which school district now have outstanding certain bonds. The areas to be owned by the water district will be withdrawn from the taxing power of the school districts. The lands of the water district located in each school district, when compared to the total area of the respective school districts, are found to constitute, 13% of the total area, in the least affected school districts, and reaching 31% in the case of the school district most affected.

"(2) There are two affected independent road districts located in Wise County, Texas, each of which have bond issues outstanding. We are advised that the area of each of these embraces approximately 144,000 acres of rural land, and as well embraces a number of towns and villages. The land to be owned by the water district will constitute approximately 3% of one road district, and in the case of the other, will constitute approximately 7% of the road district's area. These factors are taken from oral representations, but are believed to be approximately accurate. The lands to be owned by the water district are admitted not to be subject to normal taxing power of the road districts.

"(3) There are various community roads in both Tarrant and Wise Counties, which have been constructed by using either the proceeds of county-wide bond issues, or by using funds derived from county-wide tax levies. It is believed that the roads to be affected have predominantly been

constructed by the direct use of income from the annual levy of county-wide ad valorem taxes.

“(a) Various of the roads constructed by the respective counties will be constantly submerged by water to be stored by the water district for beneficial use; additional portions of each of these affected roads will be for short periods, but infrequently, be under water produced by controlling abnormal floods. So far as is known, no existing road serving through travel will be affected; these affected roads are local in character, and of cheap construction. Each of the affected counties is now seeking compensation for the roads to be actually submerged (or taken) and are as well seeking from the water district contributions to the county in order to cover the cost of improved roads placed to permit travel around and parallel with the reservoirs; in certain other instances the counties are seeking to include the cost to construct expensive causeways and bridges across the water to be stored in order to preserve directness of travel peculiar to the respective local communities; Further, in certain instances the county is claiming the right to be compensated for such portions of the roads to be cut in two by submergence as may remain between water's edge and the nearest cardinal roads; these remainders may be defined to be 'stub' roads to run from the nearest cardinal road to the water's edge. It will thus be seen that these stub roads will continue to serve the abutting lands, but that those residing on said lands will be forced to cover an altered direction, and distance, to reach a point lying in a course across the water to be stored.

“(b) In the case of claims by counties, based on the effect of the water district's works on county roads which were constructed either from the proceeds of bonds supported by a county-wide tax, or out of income from a county-wide ad valorem tax, it should be noted that the value of the lands owned by the water district will be a very small percentage of the total taxable values of a given county. In the case of Tarrant, the difference to be reflected in the county's tax levy would be expressed in the fourth or fifth decimal of a mill. This raises the question if the claim so circumstanced would not fall within the rule 'de minimus non curst lax' which a similar claim asserted by a school district having a limited area and small value might be held to constitute a matter so substantial as to require recognition by the courts.

“(c) The question of the liability of the water district to compensate land owners for possible damage to lands abutting the severed roads, is not here involved.

“(4) At a point on the Bridgeport-Graham Branch of the Chicago, Rock Island & Texas Railway Company in Wise County, Texas, the water district will construct a levee crossing the right-of-way at right angles and at an elevation approximately 20 feet higher than the present road bed. Also immediately West of this level stored water will submerge the existing track for the distance of 2.75 miles, and at times of abnormal flood the temporary maximum coverage will be an additional 1.25 miles.

“(a) There is a practical route of re-location around the reservoir of the water district which will involve construction 10.65 miles of new line. The owner road has chosen a new location to require the construction of 16.85 miles of new line. The present line was constructed for light branch line traffic and was of cheap type, which has not since been altered. The owner road now proposes to construct a line of high type and high cost. The owner road has presented a claim for a sum sufficient to cover the cost of 16.85 miles of road to cost approximately \$900,000. We are advised that the owner road, in case re-location is on the 10.65 mile route, will present claim to cover precompensation for the increased cost to maintain and operate the mileage to be added. In this connection, it should be noted that re-location on the 16.85 miles route, when compared to the existing line, will shorten the haul on through traffic.”

You propound the following inquiries :

"1. Can the water district be required to contribute to such sinking fund?

"(a) If so, who, or what governmental agency can enforce the liability, and/or give a binding acquittance in case the water district may elect to make a lump sum precompensation of the liability, if any?

"2. If the water district elects not to make precompensation of such liability, if any, but rather elects to make annual contribution as required, then what shall be the basis to determine the measure of such contributions; especially

"(a) Shall the ratio control contributions be determined for all years by comparing the present taxable value of the lands owned by the water district to the present taxable value of the remainder of the property now subject to the taxing power of the respective school districts? or

"(b) Shall the ratio to control contributions each year be determined by comparing the present value of the lands owned by the water district (such lands being then under water and not capable of being stimulated in value) to the taxable values each year to be established by the respective districts?

"(3) In case it is determined that the water district is under legal obligation to make annual contributions to the interest and sinking fund of each affected district, then, can the water district be relieved of further obligation by paying over to the school districts the approximate amount of the contribution; or, must the water district make direct payment to the respective fiscal agents representing the holders of the bonds?

"(a) In the prosecution of the public work in which the district is engaged, where it becomes necessary to appropriate an area which includes certain roads and highways in Tarrant and Wise Counties (outside the corporate limits of any town or city), does the district become liable to the county government or road district in which said highways are located (as distinguished from abutting private owners), to make compensation for roads actually submerged, or taken?

"(b) If so, would the directors of the district have authority to appropriate moneys from its treasury for such purposes?

"(c) Where, as in the case under consideration, the public work in which the water district is engaged is a public duty, in response to Article 16, Section 59, of the State Constitution and the statutes pursuant thereto, and the submergency of said roadways is a necessity in the prosecution of the enterprise, the abutting private owners having been fully compensated for injury or damage to their possessions, would liability exist to another governmental entity, such as a county or road district, or would not such entity be obliged to yield and become subservient to the police power of the State which delegated to the water district the requirement and obligation to perform the public task?

"(d) Then again: If compensation were required, what form would this compensation take: contribution to the bond issue under which such roads were built, or a restoration of taxes? And if so, for what years, and to what extent—taking into consideration the evolution of taxable values? And then again: Would the benefits of heightening values to the lands in the vicinity of the water districts be a factor to reckon with in determining compensation?

"(e) In the event it should be determined that the water district is under obligation to make some form of compensation for the roads or highways so taken or appropriated, and where it appears that such roads were built from the proceeds of bond issues yet outstanding and unpaid, to whom should such compensation be paid or awarded—the governmental entity or the fiscal agent representing the bond holder? And if to the governmental entity, then would the water district be required to see to the application of such payment?

"(f) If it should develop that the taxable value of the territory so appropriated, as compared with the total taxable area yet remaining in the

road district or in the county, would be negligible, then would the principle of *de minimis non curat lex* apply?

Replying, it is not debatable; in view of the statements by you relative to the laws and the provision of the Constitution under which this district is operating, and in view of the decisions of the courts of the State that it is a municipal corporation established for the purposes specified in the constitutional provisions and the statutes under which it functions.

If the District is a municipality and is the owner of property acquired for public purposes, then the property so acquired for public purposes is not subject to taxation. This is clearly true. See Sections 1 and 2, Article 8, Constitution, Section 9, Article XI, Constitution; Article 7150 R. C. S. 1925; *Bexar-Medina-Atascosa Counties Water Improvement District vs. State*, 21 S. W. (2) 747; *State of Texas vs. City of Dallas*, Court of Civil Appeals, 28 S. W. (2) 957.

While the opinion of the Court of Civil Appeals in the case of the *State of Texas vs. City of Dallas*, supra, does not so disclose, most of the questions submitted by you were likewise raised in that case as will be shown from an inspection of the records and briefs on file in that case. The case involved the question as to outstanding bonds of school districts, road districts and county road bonds in territory which has been submerged by the City of Dallas for public purposes; the storage of water; the question of impairment of contract was also raised in that case. Apparently, the Court was of the opinion that it was unnecessary to decide any question except the question as to whether the property so purchased and condemned was subject to taxation, and that the decision of that question carried with it the decision of the other questions so raised. See the opinion and brief for appellant in that case.

The first question which will be considered is whether the Tarrant County Water Control & Improvement District No. 1 can be required to contribute to the sinking funds for the payment of the indebtedness of other governmental agencies, such agencies and such indebtedness having been created prior to the time of the erection of the water district; or whether the water district should be required to assume, or pay any part of such indebtedness, even though such water district has taken for public purposes a portion of the taxable property of such other agencies of the government. This is a difficult question.

In the case of *Blessing vs. The City of Galveston*, 42 Tex., 641, the Court says: "No principle of law is more clearly or firmly settled than that public or municipal corporations, established for public purposes, such as the administration of local or civil government, are not in the nature of contracts between the State and the corporation, and that their charters may be annulled and revoked at the will and pleasure of the Legislature, as it deems the public good may require. 'It is,' said Justice Nelson, 'an unsound and even absurd proposition that political power conferred by the Legislature can become a vested right as against the government in any individual or body of men. * * *' The State may withdraw these

local powers of government at pleasure, and may, through its Legislature, or other appointed channels, govern the local territory as it governs the State at large. It may enlarge or contract its powers or destroy its existence.”

In the case of *Tisdale vs. Eldorado I. S. D.*, 3 S. W. (2) 420, the Supreme Court, among other things, said:

“Whether in fact any creditor has a contract whose impairment may be a result of diminution of territory of the district is questionable, for whatever agreement may have been made included notice of the existence and nature of the legislative powers mentioned. But if the concession be made * * * that some such contract may exist, the fact remains that (for aught that appears) a sufficient tax can be raised (within constitutional limits) from property within the diminished territory to satisfy its requirements. If that be the condition, in point of fact, it is difficult to perceive ground for objection by the contractor. Those taxpayers whose property is within the narrowed boundaries and whose supposed complaint the district assumes to present, are thus situated: (a) when they voted in 1909, and again in 1925, they had knowledge of the powers of the Legislature; (b) they voted (rather the requisite majority of all taxpayers voted) to authorize such a tax as would be necessary to pay interest on the bonds and to retire them in order, provided only that the measure of the tax should not exceed 25 cents on each \$100 of value in respect to the 1909 bonds (Section 3, Article 7, before the 1909 amendment) and ----- cents on each \$100 of valuation in respect to the 1925 bonds.

“If not directly shown, it is fairly inferable that the tax thus authorized is now and will continue to be ample, as applied to property within the newly defined district, to retire the bonds and pay the interest thereon as it accrues. In this connection we note that no rate was named in the order for the 1925 election, nor provision made that the rate should not exceed that previously named as maximum in the law * * * .

“We do not mean to hold that bondholders (or other taxpayers) do not have or may not in the future acquire practically justiciable rights against the exclusion from the district of the properties of defendants in error. We have commented upon their possibilities merely by way of negative present showing of palable unconstitutionality in 1925 Act and of right in the plaintiffs in error to attack the statute on those grounds.”

In the case of *Hunter vs. City of Pittsburg*, 52 L. Ed. 151, the U. S. Supreme Court, among other things, said:

“There were two claims of rights under the Constitution of the United States which were clearly made in the court below and as clearly denied. They appear in the second and fourth assignments of error. Briefly stated, the assertion in the second assignment of error is that the act of the assembly impairs the obligation of a contract existing between the City of Allegheny and the plaintiffs in error, that the latter are to be taxed only for the governmental purposes of that city, and that the Legislative attempt to subject them to the taxes of the enlarged city violates Article 1, Paragraph 9, Section 10, of the Constitution of the United States. This assignment does not rest upon the theory that the charter of the city is a contract with the State, a proposition frequently denied by this and other courts. It rests upon the novel proposition that there is a contract between the citizens and taxpayers of a municipal corporation and the corporation itself, that the citizens and taxpayers shall be taxed only for the uses of that corporation, and shall not be taxed for the uses of any like corporation with which it may be consolidated. It is not said that the City of Allegheny expressly made any such extraordinary contract, but only that the contract arises out of the relation of the parties to each other. It is difficult to deal with a proposition of this kind except by saying that it

is not true. No authority or reason in support of it has been offered us, and it is utterly inconsistent with the nature of municipal corporations, the purposes for which they are created, and the relation they bear to those who dwell and own property within their limits. This assignment of error is overruled.

"Briefly stated, the assertion in the fourth assignment of error is that the act of assembly deprives the plaintiffs in error of their property without due process of law, by subjecting it to the burden of the additional taxation which would result from the consolidation. * * * It is important, and as we have said, not so devoid of merit as to be denied consideration although its solution by principles long settled and constantly acted upon is not difficult. This court has many times had occasion to consider and decide the nature of municipal corporations, their rights and duties and the rights of their citizens and creditors. (Citing a long list of authorities). It would be unnecessary and unprofitable to analyze these decisions or quote from the opinions rendered. We think the following principles have been established by them and have become settled doctrines of this court, to be acted upon wherever they are applicable. Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the State within the meaning of the Federal Constitution. The State, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the State constitution, may do as it will unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract, or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the State, and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it."

In the case of *Laramie County vs. Albany County*, 92 U. S. 307, the Supreme Court of the United States, among other things, said:

"Such corporations are the mere creatures of the legislative will; and, inasmuch as all their powers are derived from that source, it follows that those powers may be enlarged, modified or diminished at any time, without their consent, or even without notice. They are but subdivisions of the State, deriving even their existence from the Legislature. Their officers are nothing more than local agents of the State; and their powers may be revoked or enlarged and their acts may be set aside or confirmed at the pleasure of the paramount authority, so long as private rights are not thereby violated. *Russel vs. Reed*, 27 Pa. 170. There must in the nature of things, be reserved, by necessary implication, in the creation of such corporations, a power to modify them in such manner as to meet the public exigencies. Alterations of the kind are often required by public convenience and necessity; and we have the authority of that learned judge for

saying that it has been the constant usage, in all that section of the Union to enlarge or curtail the power of towns, divide their territory, and make new towns whenever the convenience of the public requires that such a change should be made. Cases, doubtless, arise where injustice is done by annexing part of one municipal corporation to another, or by the division of such a corporation and the creation of a new one, or by the consolidation of two or more such corporation into one of larger size. Examples illustrative of these suggestions may easily be imagined." See *Kies vs. Lowry*, 199 U. S. 233; 50 L. Ed. 167; *Embree vs. City Bond District*, 240 U. S. 242; *Houck vs. Little River Dr. Dist.*, 239 U. S. 262-264; *Trimmier vs. Carlton*, 296 S. W. 1080; *Galveston vs. Municipal Wharf Co.*, 63 Texas 14.

The above authorities show conclusively that the obligations and bonds were authorized to be issued by the taxpaying voters with the full notice and knowledge of the power of the Legislature to exempt property from taxation within the constitutional limitation, and, further, they were charged with notice of the constitutional provision that property, owned or thereafter acquired by municipal corporations, is not subject to taxation under Article 8, Section 1 of the Constitution, and Article XI, Section 9 thereof. It is possible the facts will show that the remaining property valuations in such districts, and counties, will be virtually as large as before the water district was created. The rule seems to be that where there is sufficient territory left in the municipality unencroached upon to pay the outstanding indebtedness without exceeding the constitutional limitation, then the new municipality, or the one so taking the property, cannot be charged with any of the indebtedness. It may be otherwise if there is insufficient property left in the old district or counties, to care for the indebtedness outstanding without violating the constitutional provisions as to the amount of tax that can be levied.

In view of the above, it is unnecessary to answer each question propounded separately. The above authorities likewise settled the question as to the status of the water district relative to road districts and counties having outstanding indebtedness. The same rules enunciated in the above decisions would apply, and unless so much of the taxable values are taken as will not leave sufficient taxing power, without exceeding the constitutional limitation, then the district is not responsible to such other governmental agency for its outstanding obligations, or any part thereof. It will be observed there is nothing stated relative to the bond holders making any claim in their premises. In a proper case the holders of the district and county obligations would have a cause of action against the water district.

The next question to be considered is what is the liability of the District to the railroad company, the pipe line companies, the telephone companies, and the power line company. The principles which will govern one case will, in a large measure, govern each of these cases, and, for this reason, the comment to be made will refer to "the railroad" as representing all the stated cases.

If the determination of the District to erect works which will cause the railroads to be inundated, be found to be reasonably exer-

cised, as an act needed to conserve or promote the public welfare, then the taking may not be denied, subject only to these conditions of law.

(a) As to the railroad actually to be inundated there will be a "taking" which must be compensated, and the measure of compensation will be such a sum of money as will, at the time of the taking, represent the cost to reproduce a railroad comparable in character and condition to the railroad to be inundated.

(b) If, because of such inundation, the railroad (it having first been compensated for the line or measure of the road to be inundated), in order to preserve the continuity of its line, and in order to cause the same to be accommodated to the changed physical conditions, is required to construct its road around the water, or to bridge the water, at a cost exceeding the sum it has been tendered, or paid as compensation for that portion of the railroad to be inundated, then, such excess of cost may not be demanded of the District as a constitutional element of "compensation." This excess of cost must be borne by the railroad as the discharge of its duty to conform to reasonable police regulations by the State. Included in the resultant increase of expenditure, as to which the Constitution does not contemplate compensation, in a pertinent case, will be found costs incident to maintaining and operating a railroad over an increased distance.

As to whether the exercise of the State's police power is, in a given case, reasonable, is a question of fact, as was held by Pierson J. in deciding *M. K. & T. Ry. Co. vs. Rockwall County Levee Imp. Dist.* No. 3, 297 S. W. 206. In that part here material, the decision said:

"The loss, in one sense, to one or the other parties to this proceeding is inevitable, and, as we understand the law, the solution of the question who shall bear the loss, will depend upon whether or not, under all the circumstances, the construction of the proposed levees of the defendant in error is a reasonable exercise of police powers of the State for the benefit of the public welfare."

This same decision is also relied upon to sustain certain other principles embodied in this opinion. While there are numerous other decisions to the same effect, it is deemed sufficient to present the material part of the decision by the Supreme Court of the United States in the case of *Cincinnati I. & W. Ry. Co. vs. the City of Connersville*, 218 U. S. 336, as follows:

"We think the case is within a very narrow compass. * * * The case upon final analysis reduces to the question whether the police power of the State can be so applied as to require the railroad company to build a bridge without compensation, and if the railroad company was not entitled to compensation on account of the construction of this bridge—whether regard be had to the Fifth or the Fourteenth Amendments of the Constitution or to the general reserve police power of the State,—then, it is clear that the jury were not misdirected as to what should be considered by them in estimating the damage which, under the law, the railway company was entitled to recover. The question of the right of the railway company to be reimbursed for any moneys necessarily expended in constructing the bridge in question is, we think, concluded by former decisions of this Court. * * * The railway company accepted its franchise from the State necessarily subject to the condition that it would conform at its own expense to any regulations not arbitrary in their charter as to opening or use of streets,

which had for that object the safety of the public, or the proportion of the public convenience, and which might, from time to time, be established by the municipality then proceeding under legislative authority within whose limits the company's business was conducted. This court has said that the power, whether called police, governmental or legislative, exists in each State by appropriate enactments not forbidden by its own Constitution or by the Constitution of the United States to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and, therefore, to provide for the public convenience and the public good. * * * There was no error in holding that the city could not be compelled to reimburse the railway company for the cost of the bridge in question."

The question presented with reference to leasing small portions of the property until the improvements can be constructed would have no effect so long as the property is purchased or condemned for public purposes, and so used. The leasing of the same would be but trivial.

It is believed from what has been said above that Tarrant County Water Control and Improvement District No. 1 cannot be required to pay anything for the sinking funds of the various counties and districts, nor toward the payment of the outstanding obligations of such counties and districts created prior to the creation of the water district, unless and until it is shown that the taxable values of such districts and counties have been so encroached upon as not to leave sufficient taxable values within the boundaries of such counties and districts to pay their obligations without transcending the constitutional limitations as to taxes which can be levied.

There is one other question which should be discussed. The question, in effect, is asked whether the water district will become liable to the county government or road district in which highways are located, and if the water district must make compensation for roads actually submerged or taken, where, in the prosecution of its work for public purposes, it becomes necessary to appropriate an area which includes certain roads and highways in Tarrant and Wise Counties. In answering this question, it is necessary to inquire where the title to roads and road easements affected by this district's works is now reposed. The decision of the Supreme Court of Texas, in the case of *Bobbins vs. Limestone County*, 268 S. W. 915-921, and in the case of *City of Victoria vs. Victoria County*, 100 Texas 458, clearly establishes that the several counties and road districts have no title to roads or easements upon which the roads are placed. Such title, under the above decisions, is vested in the State of Texas. The fact that the water district acquires such area and roads would not be a taking from the counties or districts for which they should be compensated; they not being the owners. If it should be held that the water district is required to compensate for property taken for a public purpose from the State, it would produce the anomalous situation of the State, through an arm of its government, the water district compensating itself. The force of this is made more apparent when it is considered that the district itself can take no title as against the State. *San Felipe de Austin v. Texas*, 111 Texas 111. Again, it is true, that the water district, under the provisions of Section 59-a, Article XVI, Constitution, would have no authority to expend its funds for the purpose of the construction of highways, except as a

part of the project or undertaking for which the water district was created. It, therefore, would not have the power to contribute to such construction by another governmental agency.

What has been said answers the questions propounded, although they are not answered separately and directly in each case.

Respectfully submitted,

HEBER HENRY,
Assistant Attorney General.

Op. No. 2816.

OCCUPATION TAX ON SULPHUR PRODUCERS—STATUTORY
CONSTRUCTION.

The first due date on the fifty-five cents per long ton basis imposed as an occupation tax on sulphur producers should be construed in accord with the legislative intent to be October 1, 1930.

That construction should be followed which will render a law valid and constitutional, and in view of the caption of House Bill No. 2, Chapter 74, Fifth Called Session of the Forty-first Legislature, providing a tax based on fifty-five cents per long ton, a construction necessitating the collection of a tax in excess thereof should not be accorded the bill, thereby rendering the same unconstitutional, where another construction can be given the Act consonant with the legislative intent.

Construing House Bill No. 2, Chapter 74, Fifth Called Session of the Forty-first Legislature.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, November 6, 1930.

*Honorable George H. Sheppard, Comptroller of Public Accounts,
Austin, Texas.*

DEAR SIR: You have heretofore requested of this Department a construction of House Bill No. 2, Chapter 74, Fifth Called Session of the Forty-first Legislature. The particular question presented is whether the language "for the quarter ending on said date" as contained in said Bill, should be construed as meaning "for the quarter beginning on said date" within the legislative intent.

Article 7066, Revised Civil Statutes of 1925, imposed an occupation tax on sulphur and provided for reports to be filed on the first days of January, April, July, and October of each year, and provided for the payment of an occupation tax based on such reports, which said occupation tax would pay for the quarter beginning on date of said report.

House Bill No. 2 was introduced in the House in its original form with the same language as Article 7066, as far as this particular point is concerned. That is, it was provided that the occupation tax should be for the quarter beginning on the date of the report. (House Journal, page 151). This was directly amended by the Legislature, (see House Journal, page 154) by substituting the word "ending" for the word "beginning."

I have checked the legislative history through both the Senate and House Journals, and nowhere find that any attempts were ever made

or discussions had with reference to changing the language of the bill back to its original use of the word "beginning."

House Bill No. 2 provides that the first tax thereunder shall be due and payable on July 1, 1930. This was the form recommended by the Committee on Revenues and Taxation in a report of the bill to the House. (See House Journal, pages 151-152. The bill was then amended to further provide that nothing in said Act should prevent the collection and payment of taxes due and payable on April 1, 1930, and that such taxes should be paid as and at the rate of Article 7066, Revised Civil Statutes of 1925. (See House Journal, page 153). These amendments were severally adopted.

It was subsequent to the adoption of the foregoing amendments that the House substituted the word "ending" for the word "beginning." (House Journal, page 154). A literal construction of House Bill No. 2 does cause the parties subject thereto to pay an occupation tax twice covering the months of April, May, and June of the year of 1930. It is urged in the light of apparent inconsistencies in the Act and further in the view of the long custom obtaining in the State to collect occupation taxes in advance, that the Legislature did not intend to use the word "ending" but the use of the same was inadvertent, and that in view of the legislative intent the word "ending" should be construed to be the word "beginning." If the bill had been originally submitted with the word "ending" in it and it had passed through both Houses without any direct action on the bill, I would be inclined to the opinion that it was an inadvertence and not in accord with the legislative intent. Such was not the case. We find that the word "beginning" was in the bill as originally introduced and in the face thereof the Legislature by direct and specific amendment substituted the word "ending" for "beginning."

I can come to no other conclusion but that this was a specific showing of the legislative intent to change the period for which the occupation tax was to cover. In view of this specific amendment could it not be argued that the Legislature had in mind that where the tax was imposed on sulphur produced in the quarter preceding and the tax payable for the ensuing quarter, that a situation might arise where persons would produce sulphur through a period of, say, January, February, and March, and then by not operating in April, May, and June, and, therefore, not requiring an occupation tax for such period, relieve themselves of a great amount of taxes that would be collected had the law imposed the occupation tax for the period in which the sulphur was actually produced? This situation could not obtain under House Bill No. 2.

Under said House Bill No. 2 persons actually producing sulphur during a certain period are liable for an occupation tax for and during the period in which the actual production was made and the occupation pursued. In view of the basis of the tax being the actual sulphur produced by reason of the pursuit of the occupation, it is apparently more equitable in the present form of House Bill No. 2, because the occupation tax payable, say, for April, May, and June, is based upon the actual sulphur produced during the very months that the occupation is pursued.

I do not feel that the Legislature intended to require a double payment of a tax on this occupation covering identical periods. As set out hereinbefore the bill first provided that the first tax due under it was on July 1st. At the time this provision was carried into the bill it stipulated that the tax was payable for the quarter beginning on the report date. While still in this form the further amendment was made that nothing should prevent the collection and payment of the tax due on April 1, 1930, as and at the rate provided in Article 7066, Revised Civil Statutes of 1925. Thus far, there was no inconsistency in the provisions of the bill. No double tax was imposed.

Subsequently, the Legislature evidenced its desire to change the period for which the occupation tax was to cover, as is shown by its substitution of the word "ending" for the word "beginning." (See House Journal, page 154). From this situation is evolved the double imposition of an occupation tax on sulphur producers for the months of April, May, and June of 1930. It being readily apparent that the Legislature intended to change the period for which the occupation tax was to cover, it was evidently overlooked that with this change and to permit the first due date to occur on July 1, 1930, would result in a double collection of the tax.

We feel that the Legislature did not intend to doubly impose the tax and that if it had not been over-looked the first due date would have been changed from July 1, 1930, to October 1, 1930, so as to make it conformable to the avowed intention of the Legislature to change the time for which the tax was to cover and also eliminate the collection of the occupation tax twice for an identical period.

We are of the opinion that the bill should be so construed as to effect this evident legislative intent by changing the first due date from July 1, 1930, to October 1, 1930.

A stronger reasoning in support of the construction above announced is that by holding to the contrary House Bill No. 2 would be rendered unconstitutional. The caption or title to said House Bill No. 2 reads in part as follows:

"An Act relating to occupation tax on the production of sulphur, providing for an occupation tax of fifty-five (55c) cents per long ton of all sulphur produced within the State of Texas; . . ."

Section 3 of the Bill is as follows:

"That the first report shall be made under this Act and the first tax due and payable on July 1, 1930, and any person producing sulphur prior to that date shall make a report and pay the tax as required by this Act. That nothing in this Act shall prevent the collection and payment of taxes due on April 1, 1930 and such taxes shall be collected and paid as, and at the rate now provided by Article 7066 Revised Civil Statutes 1925."

Article 3, Section 35 of the Constitution of Texas, reads as follows:

"No bill, (except general appropriation bills, which may embrace the various subjects and accounts, for and on account of which moneys are appropriated) shall contain more than one subject, which shall be expressed in its title. But if any subject shall be embraced in an act, which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed."

House Bill No. 2, under discussion herein, contained an emergency clause, and in such form received the requisite votes to make it effective as an emergency Act, and became effective March 25, 1930. An examination of the caption clearly discloses that the Legislature intended to impose an occupation tax on the production of sulphur based on the rate of fifty-five cents per long ton of sulphur, and in such amount and at such rate only.

Article 7066 called for a tax computed on the basis of two per cent of the average market value of the sulphur produced. The average market value has been interpreted by a judgment in a suit between the State and certain sulphur producers to be Thirteen Dollars (\$13.00) per ton. Under this construction the State has and would collect a tax of twenty-six cents per long ton.

Giving a literal interpretation to said Section 3, on April 1, 1930, an occupation tax equal to twenty-six cents per long ton would be collected covering the months of April, May, and June, 1930, and in addition thereto there would be collected on July 1, 1930, a further tax for the same months of fifty-five cents per long ton, aggregating eighty-one cents per long ton. Such a construction would be contrary to the title of the bill, which recites that a tax of only fifty-five cents per long ton be collected. The title under such a construction would be deceptive and misleading, in that the Legislators who had the right to look to the caption for guidance as to the meaning and intent of the Act were led to believe that from and after the effective date of the Act only a fifty-five cent per long ton tax would be collectible.

Section 35 of Article 3 of the Constitution, *supra*, has been held by our courts to have for its purpose the prevention of the enactment of just such a situation. It was designed to prevent log-rolling and trickery in the passage of legislation in the body of the bill not comprehended by the title of the particular Act.

It is a cardinal rule of construction that where a bill is susceptible of two constructions the one will be followed which will render the bill constitutional. To construe Section 3 literally and collect an occupation tax based on eighty-one cents per long ton would be in direct conflict with the plain language of the title that provided that only an occupation tax of fifty-five cents per long ton be collected, and would, therefore, render it invalid.

House Bill No. 2 expressly repealed Article 7066, R. C. S. 1925, and such repeal was effectuated upon the effective date of said House Bill No. 2, to-wit, March 25, 1930. This effective date was prior to the April 1, 1930 date set for the collection of a tax under House Bill No. 2. The collection on April 1, 1930, was made, therefore, by virtue and subject to the provisions of House Bill No. 2.

It is evident, therefore, that the conclusion above reached as to the legislative intent results in the up-holding of the bill as being constitutional.

The construction hereinabove placed upon said Section 3 harmonizes the section with the title, brings it within the terms of the title, preserves the legislative intent, and upholds the validity of the bill.

It is our opinion, therefore, and you are accordingly advised, that the first tax due on the fifty-five cents per long ton basis under said House Bill No. 2, Chapter 74, Fifth Called Session of the Forty-first Legislature, is October 1, 1930, and quarterly thereafter, and the payment required by the Act on such dates covers the period of the quarter immediately preceding such respective report dates

Respectfully submitted.

W. DEWEY LAWRENCE,
Assistant Attorney General.

Op. No. 2817

GROSS PRODUCTION TAX—CASINGHEAD GASOLINE.

1. Article 7071, imposing a gross production tax on oil, does not comprehend casinghead gasoline, and no tax is imposed on casinghead gasoline by such article.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, December 22, 1930.

*Honorable Moore Lynn, State Auditor, Capitol Building, Austin,
Texas.*

DEAR SIR: By letter of August 1st, this department answered an inquiry from you holding that casinghead gas was included within the definition of oil set forth in Article 7071, Revised Civil Statutes, 1925, and therefore subject to the gross production tax imposed by that Article.

We have reconsidered the question and have decided to withdraw the said letter of August 1st and deliver the following opinion in answer to your said letter.

Article 7071, Revised Civil Statute, 1925, was originally enacted in 1907. It has been brought forward in both the codification of 1911 and 1925 and remains on the statute books today in its original form except for minor changes not pertaining to the issue at hand. During all of this period, the Comptroller's Department of the State government has construed the article as being not inclusive of casinghead gas. Despite this practice of the Department charged with the duty of collecting the tax imposed by said article, there have been a great number of legislative assemblies in none of which has there been passed any legislation attempting to define the particular act as meaning to include casinghead gas or in any wise overruling the construction put thereon by the Comptroller's Department.

In the language of Mr. Justice Gaines in the case of *Johnson vs. Hanscom*, 90 Tex. 328, 38 S. W. 767, the rule is announced in this language:

"It is to be presumed that the Legislature knew of the construction that had been placed upon the text and that if they were not satisfied with it, they would have so changed the verbiage as to have shown clearly a contrary intention."

The following cases, among others, are also in point; *Odem vs. Cates*, 24 S. W. (2) 381; *Stephens County vs. Hefner*, 16 S. W. (2) 804.

This theory is supported in the present instance by the familiar rule that tax statutes are strictly construed against the state and most favorably to the tax payer.

From these considerations we have concluded, after careful deliberation, that Article 7071, Revised Civil Statutes, 1925, does not impose a gross production tax upon casinghead gas and you are so advised.

Yours very truly,

W. DEWEY LAWRENCE,
Assistant Attorney General.

Op. No. 2820

COUNTY SCRIP—RIGHT OF COMMISSIONERS' COURT TO CANCEL AND
REISSUE—PAYMENT OF TAXES THEREWITH.

1. The Commissioners' Court has the right to call in and cancel small items of county scrip and issue in lieu thereof one warrant in the aggregate amount of the various items.
2. The right to pay taxes with county scrip as given under Article 7049 is not transferable.

OFFICES OF THE ATTORNEY GENERAL.

AUSTIN, TEXAS, January 23, 1931.

Hon. W. R. Hyden, County Attorney, Hemphill, Texas.

DEAR SIR: This department is in receipt of your letter of January 15, 1931, in which you ask the following question:

"The Commissioners' Court of Sabine County, Texas, passed an order yesterday to call in about \$3,000.00 in General County Scrip which has been issued to several different parties for various considerations, and bought by the Magnolia Gas Company, which the Commissioners' Court agreed to let them pay their county ad valorem taxes with, and the purpose of calling this scrip in is to cancel it, issuing a new piece of scrip in lieu of the several different pieces now held by them, in order that they might be able to pay their taxes with it. Would the Commissioners' Court be justified, under the law, in doing this; and if they should do this, even though they are not justified under the law, would the county tax collector be justified in taking this scrip?"

Answering your first question, concerning the authority of the Commissioners' Court of Sabine County to cancel various items of scrip and issue in lieu thereof a warrant for the aggregate amount of the various items, you are advised that, in the opinion of this department, the Commissioners' Court has the authority to do so. We have found no statutes or decisions to the contrary, and find no constitutional inhibition. Magnolia Gas Company is entitled to have these various small items of scrip paid in the order in which they are registered, but voluntarily surrendering same for cancellation and accepting in lieu thereof one warrant for the aggregate amount thereof, it waives such right.

Sabine County would have the right to enter into such an agreement with Magnolia Gas Company, the resultant extension of time within which to pay being the consideration therefor.

Your second question, with reference to Magnolia Gas Company's right to pay county ad valorem taxes with such scrip so acquired:

It is the opinion of this department that Magnolia Gas Company could not pay its county ad valorem taxes with a county warrant, said warrant representing various small warrants issued to individuals for services rendered the county.

Article 7049, Revised Civil Statutes of Texas, reads as follows:

"The taxes levied by this chapter are payable in currency or coin of the United States; provided, that persons holding scrip issued to them for services rendered the county may pay their county ad valorem taxes in such scrip."

We take it that the acceptance of such scrip by Magnolia Gas Company would be in violation of the spirit in which Article 7049 was written. It seems to us that the purpose of Article 7049 is to bestow the right upon individuals to realize the proceeds of warrants issued to them for services rendered the county (such as jury service, etc.,) without delay, and to realize such proceeds in full, without the necessity of discounting the same or holding the same until the money with which to pay same could be collected into the treasury. We, therefore, do not believe that the right granted to taxpayers in Article 7049 is transferable, and it is so held.

Yours very truly,

WILLIS E. GRESHAM,
F. O. MCKINSEY,
Assistant Attorney General.

Op. No. 2822

TAXATION—INTANGIBLE PROPERTY AND CHOSSES IN ACTION—SITUS
FOR TAXATION AT DOMICILE OF OWNER.

Intangible property and chosses in action left at death by owner who died in Mexico, where he resided, not subject to inheritance or transfer tax in Texas.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, January 24, 1931.

*Honorable George H. Sheppard, Comptroller of Public Accounts,
Austin, Texas.*

IN RE: Estate of J. D. Donato, deceased—Inheritance Tax Matter.

DEAR SIR: In reply to your inquiry concerning the above matter, we beg to state as follows:

The facts of this matter as stated in connection with your inquiry and about which there seems to be no controversy are, in substance, as follows:

J. D. Donato was born in the State of Louisiana, and a good many years ago removed to Matamoros, in the Republic of Mexico, where he resided until his death on the 7th day of May, 1930, on which date he resided and had his domicile in said Republic.

At his death he left considerable property in the Republic of Mexico, and real estate situated in Cameron County, Texas, of the value

of \$21,500.00, about none of which property is there any controversy.

He also left deposits in banks situated in Cameron County in excess of \$90,000.00, and left promissory notes payable to him and executed by residents of Cameron County, Texas, aggregating something more than \$25,000.00, and also left shares of the capital stock of the Texas Bank & Trust Company of Brownsville, Cameron County, Texas, of the value of \$667.67. The above stock certificates, the promissory notes and the deposit slips for said bank deposits were all kept in decedent's place of business in Matamoros, Mexico, where they were at his death. All of said property descended to residents of Matamoros in the Republic of Mexico.

The estate of said decedent has offered to pay an inheritance tax to the State of Texas on the real estate situated in Cameron County and on the stock of the two banks located in said county, but has refused to pay such tax on the value of said promissory notes and upon said bank deposits. The question you propound to this department is whether or not the estate of said decedent is liable to pay an inheritance tax upon the said notes and bank deposits; that is, whether the said property is, in law, situated in the State of Texas for tax purposes, or in its situs for such purpose in the Republic of Mexico where the decedent resided at the time of his death.

Section 11 of Article 8 of our State Constitution provides:

"All property, whether owned by persons or corporations, shall be assessed for taxation and the taxes paid in the county where situated."

In a very elaborate, comprehensive, and well considered opinion written by Mr. Chief Justice Cureton, in the case of Life Insurance Company vs. City of Austin, 112 Texas, page 1, the subject of the situs of personal property for taxation was exhaustively treated, and the following excerpts are taken from that opinion:

"It has always been the primary and fundamental rule that no sovereignty or taxing district could exercise the power of taxation, except as to property actually or constructively within its jurisdiction."

"As to intangible property the maxim *mobilia sequuntur personam* embodies the general principle in relation to its situs for the purpose of taxation. In the absence of controlling circumstances to the contrary, the general rule is that the situs of intangible property for purposes of taxation is at the owner's domicile." (Citing authorities including decisions by the United States Supreme Court).

"But the general rule is that property of an intangible nature such as credits, bills receivable, bank deposits, bonds, promissory notes, mortgage loans, judgments and corporate stock, has no situs of its own for purposes of taxation, and is, therefore, assessable only at the place of its owner's domicile regardless of the actual location of the evidence of the debt or the security named." (Citing many authorities).

The conclusion of the learned judge who wrote the opinion referred to was that, for purposes of taxation, property of the character named above and also of the character involved in this matter, is taxable only at the domicile of the owner.

Controversies in cases like this have frequently arisen, in cases where a decedent whose domicile is in one state left intangible property, the evidences of which were located in another state, and in which cases the state where such intangibles were located sought to subject same to an inheritance or transfer tax. One or two early

opinions held that such property was subject to such local tax. Such opinions have been expressly, or by necessary implication, overruled by the United States Supreme Court in recent years, and it seems now to be the settled holding of that court that property like promissory notes, bank deposits, corporate stock, and other intangibles or choses in action are situated for taxation purposes only in the state where the owner has or had his domicile and are not subject to an inheritance or other character of tax in any state other than that of the owner's domicile. The basis for this holding is that such property being situated in the state of the domicile of the owner, another state, by taxing the same, would be imposing a tax on property outside of its jurisdiction, and that would be in direct violation of the due process clause of the Fourteenth Amendment to the Federal Constitution:

The following are some of the cases in which the United States Supreme Court has held in accordance with the foregoing, to-wit:

Blodgett vs. Silverman, 277 U. S. 1; 72 Law Ed. 749.

Farmers Loan & Trust Company vs. Minnesota, 280 U. S. 204; 74 L. E. D. 190.

Baldwin, et al vs. Missouri, 281 U. S. 586; 74 L. Ed. 1056.

Francis Vidor, et al vs. S. C. Tax Commission, 75 L. Ed. 68.

Rhode Island Hospital Trust Co. vs. Rufus A. Dowden, Com. of Revenue, N. C., 270 U. S. 69, 70 L. Ed. 475.

The proposal to tax the notes and deposits involved in this inquiry would be in violation of the Federal Constitution and, therefore, void, as has been so frequently held by the Supreme Court of the United States, and it would be useless to try to impose an inheritance tax on said property even if it were in accordance with State law. Even our State Courts adhere to this rule, and our Commission of Appeals, in an opinion approved by the Supreme Court, in the case of the City of Waco v. Texas Life Insurance Company, 248 S. W. 315, announces this doctrine:

"The states have no power by taxation to impede, burden, or in any manner control the operation of the Constitution and laws enacted by Congress to carry into execution powers vested in the general government."

We, therefore, beg to advise you that the notes and bank deposits described in the statement above and involved in your inquiry, are not subject to a State inheritance tax, and no effort should be made by the State to subject them thereto.

Yours very truly,

F. O. MCKINSEY,
Assistant Attorney General.

Op. No. 2829

DELINQUENT TAX CONTRACT—REQUIREMENTS OF SAME.

1. The Commissioners Court of a county has authority to make a contract with any competent attorney to collect delinquent taxes, after thirty days notice by said Court to the County or District Attorney to collect said taxes, and the refusal of said attorney to do so.

2. In such instances the Commissioners Court has no authority to contract with any one other than a competent attorney to collect said delinquent taxes.

3. In such instances the compensation agreed to be paid such competent attorney must not exceed fifteen per cent of the delinquent taxes actually collected, exclusively of the fees prescribed by Statute for collecting delinquent taxes.

4. A contract to collect delinquent taxes not approved by the Attorney General and Comptroller of this State is void, and no compensation for collecting taxes under such contract can be allowed.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, February 4, 1931.

Hon. Tony B. Macey, County Attorney, Floyd County, Floydada, Texas.

DEAR SIR: Your favor of the 2nd instant in reference to tax contract with the Commissioners Court of Floyd County is before us for consideration, and in reply will say the proposed contract by the Commissioners Court with Mr. A. N. Corneil is insufficient for the following reasons, to-wit:

1. Said contract is not in compliance with our Statutes in that it does not in any way show or indicate that thirty days notice was given by the Commissioners' Court to the County or District Attorney of said county to proceed to collect the taxes involved, prior to the making of said contract with the said A. N. Corneil, and the refusal of the County or District Attorney to so do. See Article 7335, Revised Civil Statutes of 1925, Section One, Chapter Eight, Page Nine, Acts of the Fourth Called Session of the Forty-first Legislature; Article 7332, page thirty-seven, Acts of the Fourth Called Session of the Forty-first Legislature.

2. Said contract is defective in that it is made with Mr. A. N. Corneil who, it appears, is not an attorney at law. The Commissioners Court is not authorized to make a contract with any one to collect delinquent taxes except a competent attorney and is not authorized to make a contract with such competent attorney unless the County or District Attorney refuses to collect said taxes, as above stated. See Article 7335, Revised Civil Statutes of 1925; also, Article 7332, Page thirty-seven, Acts of the Forty-first Legislature.

3. Said contract is further defective in that it provides that the said A. N. Corneil shall be paid for his services an amount equal to fifteen per cent of the taxes, and interest on the same, which he may collect. Fifteen per cent is the maximum amount that the Commissioners' Court is authorized to pay anyone, exclusive of the fees prescribed by Statute, for the collection of delinquent taxes, so the Commissioners' Court is not authorized to pay fifteen per cent, the maximum amount allowed by law for the collection of said taxes, and in addition thereto, to pay the County or District Attorney, or any other attorney, additional compensation. See Section One, Chapter Eight of the Acts of the Fourth Called Session of the Forty-first Legislature.

In this case Mr. A. N. Corneil proceeded with the collection of delinquent taxes without any contract theretofore approved by the Attorney General or Comptroller of this State, and it follows as a

matter of course that he is not entitled to any compensation for the taxes collected thereunder.

Hoping that this is sufficient, and answers your inquiry, I am

Yours very truly,

J. A. STANFORD,
Assistant Attorney General.

Op. No. 2835

TAXATION—EXEMPTION UNDER FEDERAL STATUTES.

1. The land purchased by beneficiary with funds received from the United States Government as compensation and insurance granted by reason of the service and death of a World War Soldier, is not exempt from taxation.

2. The recipient of such funds being sui juris the Federal Government will not trace such funds through subsequent mutations so as to protect and preserve them to the beneficiary.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, March 17, 1931.

Mr. A. J. Lewis, County Attorney, Milam County, Cameron, Texas.

DEAR SIR: We have for attention your letter of the 24th ult., directed to the Attorney General, which letter reads as follows:

"I will thank you very much for the opinion of your department on the questions submitted by the within enclosure which is self-explanatory.

"There will doubtless be many other cases of the same import throughout the State, and I will appreciate very much your kind advice in the premises."

The enclosure referred to contains statement of fact and submits the quaere which you desire to be answered, as follows:

"1. This land was bought by Mrs. Dreher, taking title in her own name and paying two-thirds of the purchase price in cash and giving notes for the balance of the purchase price to her three minor children from whose estate was advanced the money to complete the payment for the land.

"2. All the money paid by Mrs. Dreher out of her own funds had previously been paid to her by the United States Veterans Bureau as compensation and insurance payments due her by reason of the disability and death of her husband, Frank D. Dreher, who was a soldier in the United States army during the World War, became insane after the war and died in a Veterans Bureau hospital.

"3. The money advanced out of the estate of the children was also money which had been paid to their guardian by the Veterans Bureau on the same account.

"4. Section 454, Title 38, United States Code, reads as follows: 'The compensation insurance, and maintenance and support allowance payable under parts II, III and IV, respectively, shall not be assignable; shall not be subject to the claims of creditors of any person to whom an award is made under parts II, III or IV; and shall be exempt from all taxation. . . .'

"Quaere: Is this land subject to any character of taxation?"

Your letter is accompanied by a helpful brief on the question involved, prepared by Henderson, Kidd & Henderson, Attorneys at Law of Cameron, Texas, and we are referred also to the opinion of this Department prepared by Assistant Attorney General L. C. Sut-

ton, Recorded on Page 275 of the Biennial Report of the Attorney General of Texas, covering the period from September 1, 1928 to August 31, 1930, which opinion evidences much research, and with the conclusions of which we entirely concur.

In the Opinion referred to the funds derived from the United States Government on accounts similar to those named in your statement, were still in the hands of the Soldier's Guardian, the Soldier being of unsound mind. Said fund had been invested in real estate by the guardian, and which real estate was held as property of the ward. Mr. Sutton held that such real property was, in such circumstances, exempt from taxation, citing a number of authorities which sustained that view.

We note that the land covered by your inquiry is held by Mrs. Dreher in her individual capacity, it appearing that the title thereto has been taken in her name. That two-thirds of the purchase money for said land was paid out of compensation received by her by reason of the disability and death of her husband, Frank D. Dreher, a United States Soldier in the World War. That the other one-third of said purchase money was paid from funds borrowed by her from the estate of her three minor children, such money of her minor children having been derived also from the same source. The fact is not stated, but we assume that this borrowed money is secured by a lien on said land.

The fact that one-third of the money which Mrs. Dreher paid for the tract of land in question was borrowed from her children's estate, and consisted of funds derived from the United States Government, as shown, above, in our opinion would not render such interest in said land exempt from taxation. It occurs to us that it makes no difference where she got the money with which to pay for the land, it is hers and her entire equity is liable for the taxes thereon. The note or other evidence of indebtedness given by her to the guardian of her children would, under the opinion of this Department above cited, be exempt from taxation, but the question is not raised here, and we cannot see how it can be a material fact in this case.

The other two-thirds of this tract of land is subject to taxation, unless the fact that the money which went to pay for same had been derived from the United States Government as compensation and insurance of her soldier husband.

Article 7145 of our Revised Civil Statutes of 1925, is as follows:

"All property, real, personal or mixed, except such as may be hereinafter expressly exempted, is subject to taxation, and the same shall be rendered and listed as herein prescribed."

Article 7150, Revised Statutes and amendments thereto, set out a list of property which is exempt from taxation, and there is nothing anywhere in our State laws which exempts the land in question from taxation. So that, if said land is exempt, it must be by virtue of some Act of Congress. The only provision of the United States Statutes which could have any bearing on the question is correctly quoted by you in Paragraph Four of your statement, which is copied above.

If the funds in question had not been paid directly to Mrs. Dreher, but had been paid to some "person who was constituted guardian,

curator or conservator" for her by reason of some disability on her part, and by such representative had been invested in the land, the land would be exempt from taxation. This results from the consideration that Congress through the Executive Officers of the General Government still retains a kind of supervision and control over said funds, and same are still in process of transmission to the beneficiary, and have never been fully and completely delivered or paid to her. We think this would also be true while the actual funds so received from the government are in possession of the beneficiary, but we see nothing in the Act of Congress itself to indicate that the United States Government would further assume any control or protection of said funds or guardianship over the beneficiary; she being sui juris will be deemed capable of handling the funds, assigning the same, using and investing them to her own advantage, and it occurs to us that if the Government should undertake to follow such funds through various mutations, and to exempt all property from taxation into which such funds can be traced it might lead to serious embarrassment and harmful results. We cannot believe Congress so intended.

In the case of the *United States vs. Hall*, 98 U. S. 343, the United States Supreme Court held that so long as the moneys were in the hands of a guardian Congress may pass laws for its protection. "Certainly until it passes into the hands of the beneficiary which is all that is necessary to decide in this case." Other authorities could be cited which hold that such funds or property is exempt in the hands of a guardian where the beneficiary is suffering under some legal disability.

In the case of *Wilson vs. Sawyer* (Ark.) 6 S. W., (2d) 825, the Supreme Court of that State held that compensation paid to a disabled soldier under the World War Veterans Act is not subject to garnishment, and that this is true whether the compensation is in the hands of the soldier or his guardian.

You are advised that in the opinion of this Department the tract of land purchased, held and owned under the circumstances stated by you, is not exempt, but is subject to a property tax.

Yours very truly,

F. O. MCKINSEY,
Assistant Attorney General.

Op. No. 2843

TAXATION—EXEMPTION FROM TAXATION.

1. Seventy-five and one-half acres of farm land owned by the Texas Scottish Rite Hospital and rented out, the rents being used for charitable purposes, is not exempt from taxation.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, April 4, 1931.

Honorable W. C. Dowdy, County Attorney, Collin County, McKinney, Texas.

DEAR SIR: Your letter of the thirty-first ultimo, addressed to the Attorney General, is in our hands for attention. We beg to thank

you for the very helpful and exhaustive brief of the question involved. Your letter contains the following statement of facts:

"The Texas Scottish Rite Hospital for crippled children is a Texas Corporation, without capital stock, the charter providing for a non-profit corporation. It admits only charity cases and no pay patients. The hospital site, the grounds and buildings used by this hospital, are situated in Dallas County, Texas.

"This corporation is the owner of certain real estate to wit: 75½ acres of farm land situated in Collin County, Texas. This farm land does not have any of the buildings located on it that are used for hospital purposes. This farm land is rented to tenant farmers who pay rent to the corporation and the corporation uses the revenue in furtherance of its charitable purpose."

You request the opinion of this department as to whether said farm land is exempt from taxation or not, and you express your conclusion that it is not exempt, with which opinion, this department concurs for reasons stated below.

Article 8, Section 2 of our State Constitution provides that the Legislature may, by general laws, exempt from taxation " * * * institutions of purely public charity."

The above provision of the Constitution is held not to be self-executing, but to require an act of the Legislature to put into effect the exemptions provided for. Authorities:

Santa Rosa Infirmary vs. City of San Antonio (Com. App.) 259 S. W., 926.

City of Houston vs. Scottish Rite Benevolent Association (Supreme Court) 111 Tex., 191.

The Legislature has, by a general law, put into effect the above exemption provision, the legislative enactment appearing as Section 7 of Article 7150, Revised Civil Statutes, which it is deemed unnecessary to quote. The construction given by the Supreme Court to the above constitutional provision is such that if the Legislature had in fact extended or broadened said exemption, so as to include the property involved herein, such legislative act would be unconstitutional.

Exemptions from taxation are never favored and, in construing laws exempting any citizen or class of property, all doubts are resolved against the exemption. Authorities:

Santa Rosa Infirmary vs. City of San Antonio, supra.

Trinity M. E. Church vs. City of San Antonio, 201 S. W., 669.

Millers Mutual Fire Insurance Company vs. City of Austin, 210 S. W., 825.

Morris vs. Masons, 68 Tex., 703.

In the case of Morris vs. Masons, 68 Tex., 698, the Supreme Court paraphrased the above quoted constitutional provision so as to make its meaning clear, as follows:

"* * * but the Legislature may, by general laws, exempt from taxation all buildings used, exclusively and owned by * * * 'institutions of purely public charity.'"

In the case of City of Houston vs. Scottish Rite Benevolent Association, supra, the said Association bought lots and erected thereon a Scottish Rite Cathedral, separate portions of which were occupied

and used by said Association and by two other Masonic organizations.

In that case, the Supreme Court held that the Cathedral was not exempt from taxation, and uses the following language:

“So, no building comes within the exemption authorized by the Constitution to ‘institutions of purely public charity’ unless it is both owned and used exclusively by such institution.”

And,

“The actual, direct use must be exclusive on the part of such an institution as is favored by the constitutional provision.”

In the case of *State vs. Settegast*, 254 S. W., 925, trustees for the Hermann Hospital Estate owned and operated a public charity hospital, and as a part of said estate, owned six regular city blocks on which were located rent cottages, the rents from which were used for charitable purposes.

The Supreme Court adopted the opinion of the Commission of Appeals and held said property subject to taxation because the same was not used exclusively by the charitable institution, and that

“The exemption could not be extended to property occupied and used by third parties under rental contracts.”

In *Santa Rosa Infirmary vs. City of San Antonio*, 259 S. W., 926, the above holding is reiterated and the Commission of Appeals, in an opinion adopted by the Supreme Court, uses the following language:

“The constitutional requirement is twofold; it must be exclusively owned by the organization claiming the exemption; it must be exclusively used by the organization, as distinguished from a partial use by it and a partial use by others, whether the others pay rent or not.”

In *Masonic Temple Association, et al vs. Amarillo Independent School District*, 14 S. W. (2d), 128, the Amarillo Court of Civil Appeals quotes from the above Supreme Court opinions and follows them, and uses this language:

“The actual, direct use must be exclusive on the part of such an institution as is favored by the constitutional provision.”

Writ of error was refused.

Under the foregoing authorities and others which might be cited, this department is constrained to hold that the seventy-five and one-half acres situated in Collin County, Texas, and owned by the Texas Scottish Rite Hospital for Crippled Children, under the facts stated by you, is not exempt from taxation.

Yours truly,

F. O. MCKINSEY,
Assistant Attorney General.

Opinion No. 2853

TAXATION OF UNIVERSITY LANDS—TAXES FOR COUNTY PURPOSES
—OIL ROYALTIES

1. University lands, under Section 16-A of Article VII of the Constitution and Senate Bill No. 403, General Laws of Regular Session, Forty-second Legislature, are taxable only for county purposes and are not sub-

ject to special taxes for school, road or other districts. "County purposes" defined and enumerated.

2. The value of University lands fixed by the State Tax Board for purposes of taxation is not subject to revision by the Tax Assessors and Commissioners' Courts of the counties in which those lands lie.

3. Whether royalty interest retained by lessor is interest in land subject to taxation depends on form of lease used and on outcome of pending litigation; status thereof stated herein.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, June 11th, 1931.

Hon. Geo. H. Sheppard, State Comptroller of Public Accounts, Capital Building, Austin, Texas.

DEAR SIR: Your communication of May 29, 1931, addressed to Honorable James V. Allred, Attorney General, and requesting a conference opinion upon the construction to be placed upon Senate Bill No. 403, Acts of the Regular Session of the Forty-second Legislature, has been received. This act is an enabling act passed for the purpose of making effective an amendment to the State Constitution known as Sec. 16-A of Art. VII, which was submitted by the Forty-first Legislature and ratified on November 4, 1930. The Constitutional Amendment in question reads as follows:

"Sec. 16-A. All land mentioned in Secs. 11, 12 and 15 of Article VII of the Constitution of the State of Texas, now belonging to the University of Texas, shall be subject to the taxation for county purposes to the same extent as lands privately owned; provided, they shall be rendered for taxation upon values fixed by the State Tax Board; and providing, that the State shall remit annually to each of the counties in which said lands are located an amount equal to the tax imposed upon said land for county purposes."

Senate Bill No. 403 of the Forty-second Legislature, approved April 27, 1931, reads as follows:

"BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

"Section 1. All lands set apart for the endowment of the University of Texas by Section 15 of Article 7 of the Constitution of 1876, and by Chapter 72 of the Acts of the Regular Session of the 18th Legislature, which are now unsold, are hereby declared to be subject to taxation for county purposes in the counties in which they are located, to the same extent as lands privately owned in said counties.

"Sec. 2. It shall be the duty of the Comptroller of Public Accounts, from records in his office, to submit to the State Tax Board data as to value fixed upon privately owned land contiguous to the University of Texas lands in the several counties.

"Sec. 3. It shall be the duty of the Commissioner of the General Land Office to furnish the State Tax Board with maps showing the location of said University of Texas lands, herein declared to be subject to taxation.

Sec. 4. It shall be the duty of the State Tax Board to place the valuation upon which said land shall be assessed and rendered for taxation. It shall further determine the taxable value of lands in each county separately. In arriving at its amount to be paid in taxes the values of the land only shall be considered, and not the value of any buildings or other improvements, owned by the State and situated upon said land.

Sec. 5. The Tax Collector of each county which contains any of the land enumerated in Section 1 hereof, shall render to the Comptroller of Public Accounts by October 1 of each year a certified statement showing the values

fixed by the State Tax Board upon said lands, the county rate of taxation, and the amount due said county as taxes upon said land.

Sec. 6. It shall be the duty of the Comptroller of Public Accounts to issue warrants upon the general Fund to pay taxes due each county, beginning with taxes assessed for the year 1931, and annually thereafter; said warrants to be issued and mailed to the several counties within the time as now provided by law for the payment of county taxes on privately owned lands.

Sec. 7. The fact that the people of Texas at the last General Election adopted a Constitutional amendment making it mandatory that the State pay taxes upon the lands named herein to the counties in which they are located, and the further fact that there is now no Statute upon the Books providing the machinery by which such lands shall be valued and taxes assessed, creates an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended, and said Rule is hereby suspended, and that this Act shall take effect and be in force from and after its passage, and it is so enacted."

It will be noted that the Constitutional Amendment in question authorizes the taxation of all lands set apart and appropriated as an endowment for the University of Texas, while the enabling act (Senate Bill No. 403) limits that taxation to the one million acres set apart by the Constitution of 1876 and the one million acres set apart by the Eighteenth Legislature in 1883. For practical purposes this distinction is immaterial, because all of the more than 200,000 acres embraced in the fifty league grant to the University by the Republic of Texas in 1839 have been sold, and all the University lands now unsold are embraced in the endowments of 1876 and 1883.

The questions asked by you will now be taken up and answered separately in the order in which asked, your first question being as follows:

"(1) Are University lands under the Constitutional Amendment adopted and Senate Bill No. 403 subject to special taxes for School and Road Districts and other political subdivisions of the county in which they are situated?"

The above quoted provision of the Constitution provides that University lands shall be *subject to taxation for county purposes*. The answer of your question involves a determination of what is embraced within the expression "county purposes." No tax levied by a local school or road district or other special district within a county, or political sub-division of a county, is a tax for county purposes. See opinion of Hon. James V. Allred, Attorney General, to Hon. T. J. Holbrook, State Senator, dated February 9, 1931, recorded in Letter Book No. 3000, Page 633, also opinion No. 2440 of this department addressed to Board of Prison Commissioners and appearing at pages 580 et seq., Reports of Attorney General, 1920-22. As stated in the former well-reasoned opinion, the term "county purposes" relates to a purpose county-wide in character for which a county-wide tax is levied against all the taxable property in the county.

What tax is a tax for "county purposes" has also been considered and ably passed upon by the Austin Court of Civil Appeals in a case in which the Supreme Court refused a writ of error. See *Bell County vs. Hines*, Director General of Railroads, 219 S. W. 856. All parties in that case were represented by able counsel, those for the county

including the Hon. C. M. Cureton, then Attorney General and now Chief Justice of this State. It is noteworthy that the Appellate Court reversed and rendered that case in favor of the county. In determining what bonds are issued for county purposes and whether the particular bonds involved were issued by a county or by a road district whose boundaries coincided with those of a county, the court said:

“(1) ‘Defined districts,’ as that term is used in the Constitution, (Art. 3, Sec. 52), means a defined area in a county, and less than the county, other than a political subdivision of such county. In addition to ‘defined districts,’ the amendment to the Constitution above set out authorized any political subdivision of a county, any number of adjoining counties, or any political subdivision of the State to issue bonds, upon the vote of the qualified taxpaying voters of the territory to be affected, for public road purposes, and to levy a tax upon the property of such territory to take care of such bonds.

“We agree with appellee that such territory may properly be called a road-taxing district, whether the same be less than a county or more than a county, but not so as to a county. Our reason for this distinction is that the subdivisions mentioned, other than counties, were unknown as taxing units until created by statutes of comparatively recent date; but counties, as taxing units for county purposes, have existed from the foundation of this government. Counties had the right to levy taxes within the limits prescribed by the Constitution, for county purposes, prior to the amendment of the Constitution as hereinbefore set out. Construction and maintenance of public roads within a county are county purposes. Prior to the adoption of said amendment, counties, political subdivisions, and defined road districts were limited as to the total amount of taxes which they could levy to 30 cents on the \$100. This limit was removed, and road districts were permitted to be formed so as to comprise more territory than a single county. The limitation as to the amount of taxes that could be levied for road purposes was removed, not only as to road districts, but also as to counties. The constitutional amendment would have been the same, in so far as it affects counties, if it had made no reference to road districts, but had read:

“‘Under legislative provision, any county, upon a vote of two-thirds of the resident taxpayers voting thereon, who are qualified to vote in such territory, in addition to all other debts, may issue bonds,’ etc.

“The fact that this provision was granted to divisions of territory other than counties did not deny the same to counties. On the contrary, by the express language of the Constitution, it is granted to counties also.”

The entire case is too long to be quoted here, but a reading thereof will clearly show that the Court held that the tax must be co-extensive with the limits of the county, and equally applicable to all parts thereof to fulfill the requirement of a tax for county purposes. It must not extend beyond the limits of that county; a tax covering several counties joined together for special taxing purposes is a district tax, not a county tax. And this case, together with the case of *State vs. Ry. Co.*, 209 S. W. 820, shows that a tax may be collected from a district whose boundaries coincide with those of a county, yet not be a county purpose tax because not levied by the county itself.

The University Lands Taxation Amendment was submitted by the Forty-first Legislature. That body contained many members who were members also of the Thirty-ninth Legislature. The Thirty-ninth Legislature had submitted Section 8a of Article VII of the Consti-

tution (adopted Nov. 2, 1926), and the Forty-first must necessarily have had that section in mind in submitting the University Amendment. Sec. 6a of Art. VII, permitting taxation of county school lands, reads as follows:

"Sec. 6a. All agriculture or grazing school land mentioned in Sec. 6 of this article owned by any county shall be subject to taxation except for State purposes to the same extent as lands privately owned."

The difference in this Amendment and in Section 16-A, Art. VII, which is copied at the beginning of this opinion, is apparent at a glance. In permitting taxation of county school lands the Amendment was inclusive, embracing all taxation except for State purposes. On the other hand, the Amendment permitting taxation of University lands is limited in its scope, permitting only one specific type of taxation thereof, viz: for *county purposes*. The Forty-second Legislature, by Senate Bill No. 403, copied above in this opinion, declares in Section One thereof that these lands (University) are subject to taxation *for county purposes*, in the counties in which they are located. Section Five of that bill requires the county tax collector to notify the State Comptroller of Public Accounts of the *county rate* of taxation, and the amount *due said county* as taxes upon said land. Section Six requires that the State Comptroller mail warrants in payment of taxes to the *several counties*. Section Seven, being the emergency clause, declares that the Amendment requires that the State pay taxes upon the lands therein named *to the counties*. The plain terms of the Amendment and Senate Bill No. 403, passed in pursuance thereof, preclude payment by the State of special taxes for school and road districts and other political sub-divisions of the county.

In our opinion, a tax for a county purpose is a tax which, in geographic extent, covers the entire county and that county only, and is one which is levied by the county itself, not by a special district or other governmental agency. Thus, two elements are necessary before we have a tax for a county purpose (it being assumed that the tax by the county is one authorized by law):

A.—The individual county, standing alone, is the geographic unit of taxation.

B.—The tax must be levied by the county itself, acting in its governmental capacity, and through its regular officers, under the authority delegated to it by law.

Those taxes which the counties are authorized by law to levy and which are for county purposes, within the meaning of the constitutional amendment under consideration, are as follows:

- I. (a) Not to exceed 25 cents on the one hundred dollar valuation for general county purposes;
- (b) Not to exceed 15 cents on said valuation for roads and bridges;
- (c) Not to exceed 15 cents on said valuation to pay jurors;
- (d) Not to exceed 25 cents on said valuation for the erection of public buildings, streets, sewers, waterworks and other permanent improvements;
- (e) Not to exceed two and one-half mills on the one dollar valua-

tion for the purpose of paying county debts incurred prior to the eighteenth day of April, A. D. 1876.

(f) A tax at such rate as may be necessary for the purpose of paying county debts incurred subsequent to the eighteenth day of April, A. D. 1876, and prior to the twenty-fifth day of September, A. D. 1883; and

(g) An additional annual tax of not to exceed 15 cents on the one hundred dollar valuation for the further maintenance of the public roads, provided, however, that this additional 15 cent tax for further maintenance of said public roads shall not be levied unless such tax is voted by a majority of the qualified property taxpaying voters of the county at an election to be held for that purpose. Const., Art. 8, Sec. 9; 1925 Revised Civil Statutes of Texas, Articles 2352 and 2353.

II. Such tax, if any, as may have been voted by the whole county, acting as a separate unit in its governmental capacity, and independently of any other county or political sub-division, by a two-thirds majority of the resident property taxpayers voting thereon, for the purpose of issuing bonds, in no event to exceed one-fourth of the assessed valuation of the real property of the county, for

(a) The improvement of rivers, creeks and streams, to prevent overflows and to permit of navigation thereof or irrigation therefor, or in aid of such purposes;

(b) The construction and maintenance of pools, lakes, reservoirs, dams, canals and waterways for the purposes of irrigation, drainage or navigation or in aid thereof;

(c) The construction, maintenance, and operation of macadamized, graveled or paved roads and turnpikes or in aid thereof. (Constitution, Art. 3, Sec. 52; 1925 Revised Civil Statutes of Texas, Articles 726 to 784 inc., as amended by Acts of Thirty-ninth Legislature, First Called Session, and Acts of Fortieth Legislature, First Called Session, Articles 803 to 822 inc., as amended by acts of Fortieth Legislature, Regular Session).

No taxes other than these above enumerated are authorized to be levied and collected for county purposes. Section 59 of Article 16 of the Constitution which permits issuance of bonds for conservation and development of natural resources refers solely to districts, not to counties. The various counties interested may tax University lands situated therein for such of the above enumerated purposes and to the same extent as private lands therein may be taxed, subject, however, to limitations to be noted in the following paragraphs.

“(2) Are the values fixed by the State Tax Board on the University lands for purposes of taxation under this law subject to revision by the Tax Assessor and Commissioners’ Courts of the several counties in which the lands lie?”

As a general proposition of law, the property of a State is exempt from taxation because it is one of the instrumentalities through which the State performs its governmental functions. In this particular case the State has waived that exemption in favor of local agencies created by it. The power to tax is the power to destroy, and in waiving its exemption it is but natural that the state retain certain safe-

guards to protect itself from excessive taxation on the part of local communities. The Constitutional Amendment itself provides that the University lands shall be rendered for taxation upon values fixed by the State Tax Board. That was an express constitutional condition of the grant to the counties of the right to tax University lands. If the counties in which University lands are situated claim the benefits of that amendment, they must claim those benefits subject to the limitations therein imposed. Sections Two and Three of Senate Bill No. 403 provide a means through which the State Tax Board may obtain information of the extent, location and value of the University Lands. That Board is in no manner dependent upon the local Tax Assessors or Commissioners' Courts for that information. Section Four of the Act contains this provision:

"It shall be the duty of the State Tax Board to place the valuation upon which said land shall be assessed and rendered for taxation."

Section Five makes it the duty of the respective Tax Collectors to forward to the State Comptroller of Public Accounts certified statements showing *the values fixed by the State Tax Board upon said lands.*

In our opinion, the amendment adopted and Senate Bill No. 403 enacted pursuant thereto make the decision of the State Tax Board final on the question of the value of the lands. There is no appeal from their decision to the Tax Assessor or Commissioners' Court, nor, except perhaps in case of fraud, is there any appeal to any source from their decision. In waiving its exemption from taxation, the State may impose such conditions as it sees fit on the exercise of the taxing privilege by its local governmental agencies, and no one may be heard to complain.

Attention is also directed to the reference to "the county rate of taxation," contained in Section Five of the Bill. That means the rate actually levied and collected on privately owned lands during any one year and does not mean that the counties may collect from the University lands the full rates which they were authorized to levy on private lands, irrespective of whether they had actually levied and collected taxes on such full rates.

"(3) In regard to University lands under this Act on which there is oil production, would it be the duty of the State Tax Board valuing such lands to add to the surface or fee value of the lands the value of the royalty interest retained by the University where there is oil production on such land? Should the State Tax Board place a value on the royalty interest retained in University lands that have been leased but on which there is no production?"

Section Four of Senate Bill No. 403 provides that in arriving at the amount to be paid in taxes the values of the land only shall be considered, and not the value of any buildings or other improvements, owned by the State and situated upon said land. This provision is similar to that contained in Section Four of Article 7150 of the 1925 Revised Civil Statutes, dealing with taxation of penitentiary lands. Except for this limitation, which obviously covers buildings, fences, windmills and other State owned improvements, these lands are taxable to the same extent as lands privately owned. Whether or not

the royalty interest retained on University lands is taxable is governed by rules applicable to lands owned by private persons.

Oil and gas in place are minerals, forming a part of the soil, and are taxable as such. An oil and gas lease in any one of the several forms in common use in Texas conveys an interest in land, and that interest is subject to taxation in the hands of the lessee, *Stephens County vs. Mid-Kansas Oil and Gas Company*, 113 Texas, 160; 254 S. W. 290; *Texas Company vs. Daugherty*, 107 Texas 226, 176 S. W. 717.

Whether or not the royalty interest or other interest retained by the University in an oil and gas lease is taxable will depend upon the form of lease in use at the time. If the lease amounts to an outright conveyance of all the oil and gas in place for a stated consideration, then there is no interest retained by the University in that part of the soil consisting of oil and gas, and hence, there is no property right therein properly taxable as lands in the hands of the lessor. *Stephens County vs. Mid-Kansas Oil & Gas Company*; *Texas Company vs. Daugherty*, supra. If the lease has the effect of retaining in the State (for the University) title to a proportionate part of the oil and gas in place as a royalty, then that royalty interest so retained is land and taxable as such. Certain other phases of this question are now in litigation in the Appellate Courts of this State in the case of *Hogg et al vs. Sheffield*, and since this department is representing the State of Texas as an intervenor in that case, we deem it inappropriate for this department to now render an official opinion upon the questions there involved.

The question of whether or not production has been had on leased lands is immaterial in determining whether the "royalty interest" is taxable as land. It would, of course, affect the market price and hence the value thereof, but not the question of whether the royalty interest is land. That question would be determined by the form of the lease or conveyance used, together with the rules of law applicable thereto, none of which differentiate on that question between producing and non-producing lands.

Very truly yours,

R. W. YARBOROUGH,
Assistant Attorney General.

Op. No. 2869

OCCUPATION TAX—GOVERNMENTAL INSTRUMENTALITIES ..

1. An occupation tax on sales of cigarettes purchased in intrastate commerce by a United States post exchange is not a tax on a governmental enterprise, and may be collected where the sale is consummated off the military reservation.
2. The state cannot collect an occupation tax on a sale consummated on a military reservation.
3. The law of sales discussed as to when title passes in the sale of personal property.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, August 27, 1931.

Hon. Geo. H. Sheppard, Comptroller of Public Accounts, Austin, Texas.

DEAR SIR: This department is in receipt of your inquiry dated August 19, 1931, with reference to the effect of Acts of the Forty-second Legislature, Regular Session, Chapter 73, on cigarettes purchased for sale on United States military reservations in this state by post exchanges. The appropriate part of the Act reads as follows:

" . . . there is hereby levied a tax on all sales in intrastate commerce, in this State of cigarettes, made of tobacco, or any substitute therefor, and weighing not more than three pounds per thousand of One Dollar and fifty cents (\$1.50) per thousand, and on those weighing more than three pounds per thousand of Three Dollars and sixty cents (\$3.60) per thousand. . . .

"It is the purpose and intent of this Act to relieve retail dealers in cigarettes in this State from accountability by reason of sales thereof, except to make it unlawful to sell cigarettes on which the tax herein levied has not been paid, and which are not contained in packages or parcels to which are securely affixed the stamps evidencing payment of tax as required by this Act; . . ."

The first inquiry which you propound is as to whether or not cigarettes purchased in Texas by post exchanges for sale to soldiers on United States Military reservations are subject to the tax above set out.

In passing on this inquiry, it is necessary first to determine whether or not the State of Texas may legally levy an occupation tax on a sale of cigarettes made to a post exchange for the convenience of soldiers of the national government. It is elementary that no state has the power to tax the instrumentalities of the Federal Government. *McCullough vs. Maryland*, 4 Wheat, 316, 4 L. Ed. 579; *Metcalf and Eddy vs. Mitchell*, 269 U. S. 514, 46 S. Ct. 172. The converse is likewise true.

Those agencies through which either government immediately and directly exercise its sovereign powers are immune from the taxing power of the other. It, therefore, has been held that the income derived by a lessee from sales of his shares of oil and gas received under leases of Indian lands which constituted him in effect an instrumentality used by the United States in fulfilling its duty to the Indians, cannot be taxed by a state. *Gillespie vs. Oklahoma*, 257 U. S. 501. It has also been held that coal mining company, operating a coal mine on Indian lands under national authority, is a Federal instrumentality and as such is not subject to an occupation tax in so far as the receipts derived from such mines are concerned. *Choctaw etc. Railroad Company vs. Harrison*, 235 U. S. 292. One of the most recent expressions of the United States Supreme Court on this subject is found in the case of *Panhandle Oil Company vs. Mississippi*, 277 U. S. 218, 48 Supreme Court 451, in which it is held that a distributor of gasoline is not liable for an occupation tax levied upon the sales of such gasoline in intrastate commerce in so far as sales made to the United States government for the use of its coast guard fleet and

its veterans hospital are concerned. The court in that case held that the necessary effect of the tax was directly to retard, impede and burden the exertion by the United States of its constitutional powers to operate the fleet and hospital. Upon the authority of this case the United States Supreme Court held, in the case of Grayburg Oil Company vs. Texas, 278 U. S. 582, 49 Supreme Court 185, that the State of Texas was not entitled to recover an occupation tax on sales of gasoline made by a distributor to the United States government.

The rules announced, however, do not go to the extent of holding that every agency which may indirectly be serving governmental purposes is exempt from taxation. In *Santa Clara County vs. Southern Pacific Railroad*, 18 Fed. 385, affirmed 118 U. S. 394, and *California vs. Railroad*, 118 U. S. 417, it was held that the property and franchise of the railroads involved were not exempt from state taxation although the companies were employed by the general government for postal and military purposes and were aided by land grants and loans in the construction of their roads.

It has likewise been held that a corporation whose railroad was under Federal control was subject to a franchise tax under state law. *Railway vs. Middlekamp*, 256 U. S. 226, 41 Supreme Court 489. A surety company executing bonds required by the United States does not become a Federal instrumentality exempt from a state tax. *Fidelity and Deposit Company vs. Pennsylvania*, 240 U. S. 319, 36 Supreme Court 298.

The right of the national government to tax the instrumentalities of the state governments is subject to the same restrictions as are the states in taxing instrumentalities of the national government, but the tax to be invalid must be directly on an instrumentality of a state government and must substantially impair the carrying out of the sovereign prerogatives of the state. *Metcalf and Eddy vs. Mitchell*, supra. In that case it was held that an income tax was valid when levied on the income of consulting engineers who had received compensation for services rendered under a contract with the state.

Applying the rules laid down in the foregoing authorities, it seems to us that the functions of a post exchange whereby the officers and men of a regiment or company organize a store for their own use and convenience, are not governmental in character, and we conclude that a state may legally levy an occupation tax on sales made in intrastate commerce to such organizations, assuming that the sale is actually consummated within the boundaries of the state and without the boundaries of the military reservation.

In the case of *Panhandle Oil Company vs. Mississippi*, supra, the Supreme Court went so far as to hold that an occupation tax on the sale of gasoline to the United States government could not be collected. There undoubtedly the product upon the sale of which the tax was attempted to be levied was for the direct and necessary use of the United States government, yet it appears that four of the nine members of the Supreme Court dissented from that opinion and contended that the state had the right to collect the tax and that the interference with governmental functions was too remote.

It is our opinion that the purchase and acquisition by soldiers of cigarettes is not any more a governmental function than would be their attendance at a moving picture show or a base ball game. To use the language of Justice Holmes in his dissent in the Panhandle Oil Company case:

"I am not aware that the President, the members of Congress, the Judiciary or, to come nearer to the case in hand, the Coast Guard or the officials of the Veterans Hospital, because they are instrumentalities of government and cannot function naked and unfed, hitherto having been held entitled to have their bills for food and clothing cut down so far as their butchers and tailors have been taxed on their sales; and I do not suppose that the butchers and tailors could omit from their tax returns all receipts from the large class of customers to which I have referred."

It is to be noted that the tax in question is levied on the person who first sells the cigarettes in intrastate commerce and not on the purchaser thereof. The Act provides:

"Such tax shall be paid only once, on account of any cigarettes so sold, by the person, firm or corporation making the first sale thereof in intrastate commerce in this state."

Thus, even if we are mistaken in our position that the purchase and acquisition of cigarettes in this manner is not a governmental enterprise, since the tax is on the seller and not on the buyer, it would not be invalid.

It is only on sales which are consummated in intrastate commerce, and not on a military reservation, on which the state is entitled to collect an occupation tax. United States Constitution, Article 1, Section 8, provides that Congress shall exercise *exclusive legislation* of all places purchased by the consent of the Legislature of the state in which the same shall be for the erection of forts, etc. The Legislature of Texas, in Article 5242, Revised Civil Statutes, has given its consent to such purchase.

This department has heretofore held, in an excellent departmental opinion, written April 12, 1920 by Hon. L. C. Sutton, Assistant Attorney General, that the State of Texas has no power or authority to collect an occupation tax from persons operating a carnival on a military reservation. We concur in that opinion and, following same, hold that the state has no right to collect an occupation tax on a sale of cigarettes where the only sale made in intrastate commerce is on a military reservation.

It becomes necessary, therefore, to determine where the sale is consummated where cigarettes are purchased by a post exchange from a Texas dealer; that is, whether the title to the cigarettes passes from the seller to the buyer at the seller's place of business or at the military reservation. In the former case, the sale is subject to the occupation tax. In the latter, it is not.

As a general rule, it may be stated that the time when title passes in a sale of personal property is dependent upon the contract between the parties and their intention. In many cases, however, no formal contract is entered into and the intention of the parties must be arrived at by a consideration of the legal effect which the law

gives to certain facts and circumstances surrounding the sale. A leading case in Texas on the subject of when title passes in such a case is *Cleveland vs. Williams*, 29 Tex. 204. This case announces the rule that delivery between the parties is not essential to the completeness of a sale of chattel unless made so by the terms of the bargain. This court quotes with approval the rule laid down by Kent in his commentaries, as follows:

"If anything remains to be done, as between the seller and buyer, before the goods are to be delivered, a present right of property does not attach in the buyer. . . . But where everything is done by the seller, as to a parcel of the quantity sold, to put the goods in a deliverable state, the property and consequently the risk passes to the buyer. . . . The goods sold must be ascertained, designated, and separated from the stock or quantity with which they are mixed before the property can pass."

As soon as the goods are separated and put in a deliverable state, ordinarily the title to same passes from the seller to the buyer, in the absence of a contract, to the contrary. 35 Cyc. 283. This authority likewise lays down the rule (page 94) that "a sale is deemed to be made at the place where it is executed by a transfer of the property in the goods from the seller to the buyer."

We, therefore, hold that except where the sale is actually finally consummated and the title to the cigarettes passes from the seller to the buyer on the military reservation, that the state is entitled to collect an occupation tax on such sale. Where the goods are delivered to the post exchange by the seller on a c. o. d. basis, title would not pass until the money was paid, and, therefore, a tax could not be collected on such sale. Where the post exchange orders the cigarettes by telephone and they are brought on open account, the sale would be consummated at the place of business of the seller and the tax could be collected. Where the post exchange sends its own trucks to the seller's place of business and purchases the cigarettes, either on open account or for cash, the sale would be there consummated and the tax would accrue.

We are informed that in some instances the jobbers take drop shipment orders from the post exchanges and the goods are shipped from the factory to the post exchange in care of the jobber who delivers them to the post exchange. In our opinion this is an interstate transaction upon which the state cannot legally levy an occupation tax. See *Dickson Publishing Company vs. Bryan*, 5 S. W. (2d) 980. The same rule would, of course, apply to a shipment made directly from the factory to the post exchange.

Trusting this satisfactorily answers your inquiry, we are

Yours very truly,

MAURICE CHEEK,
Assistant Attorney General.

Op. No. 2872

TAXATION—EXEMPTION FROM TAXES
LANDS OWNED BY CITIES FOR RESERVOIR PURPOSES

1. In order to render lands owned by a city exempt from taxation, the same must be presently used for some public purpose.

2. Where lands are owned by a city for purposes of a reservoir and work thereon begins within a reasonable time and is prosecuted to completion with due diligence, such lands are exempt during such period.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, August 17, 1931.

*Honorable Omar T. Burlison, County Attorney, Jones County,
Anson, Texas.*

DEAR SIR: We have for consideration and reply your letter of the 6th instant, addressed to the Attorney General. Your letter containing the statement of facts in the matter inquired about and also your inquiry is in words and figures as follows:

"I respectfully request your opinion in the matter and question as to the requisites constituting public property and to determine whether or not such property is taxable or exempt from taxation for reason of being public property.

"Article 7150, Revised Civil Statutes of Texas, 1925, is not clear as to what lands are made public lands by virtue of its use and purpose. Section No. 4 of the above Article referring to exemptions, says: 'All property, whether real or personal, belonging exclusively to this State, or any political subdivision thereof, or the United States, except that in each county in this State, where the State of Texas has or may acquire and own land for the purpose of establishing thereon State farms * * * etc.' Further, in Section No. 9 of the same Article: 'All market houses, public squares, or other public grounds, town or precinct houses or halls used exclusively for public purposes, and all works, * * * etc.'

"The above Article and Sections were used in the case of Denton County vs. The City of Dallas.

"In the years 1928, 1929 and 1930, the City of Abilene, Taylor County, Texas, purchased tracts of several hundreds acres of land in Jones County as a lake-site for said City. These lands included the lake-site and a large territory for drainage. The City refused to consider the payment of any taxes on this property, yet, the City receives revenues from the lands by renting and leasing lands for farming purposes. The lands are not being used for a public purpose and no prospects that it will be so used in the near future.

"The above lands are situated in Common School Districts in Jones County, carrying bonds payable over a period of twenty years at 5% interest. You see that these districts cannot exist under the above circumstances.

"In view of the fact that this land is in no manner being used for a public purpose, but does belong to a political subdivision of the State, is it probable that such taxes could be collected by suit?"

Section 9 of Article 11 of our Constitution is as follows:

"The property of counties, cities and towns owned and held only for public purposes, such as public buildings and the sites therefor, fire engines and the furniture thereof, and all property used or intended for extinguishing fires, public grounds and all other property devoted exclusively to the use and benefit of the public, shall be exempt from forced sale and from taxation, provided nothing herein shall prevent the enforcement of the vendor's lien, the mechanic's or builder's lien, or other liens now existing."

It will be observed that the above provisions are self-enacting and require no enabling act by the Legislature. It is also evident that property belonging to a city which is not owned and held for public purposes is subject to taxation. *Galveston Wharf Co. vs. Galveston*, 63 Texas 14; *Texas Employer's Association vs. City of Tyler*, 283 S. W. 930, 9933 (15).

It is well settled that land acquired by a city which is actually used for a reservoir site for furnishing its inhabitants with water is exempt from taxation, although situated outside of the city limits or even in another county. *The City of Dallas vs. State*, 26 S. W. (2nd) 937. (Writ of Error refused.) The same case holds that cities are liable for the taxes on lands held and used for a reservoir, which taxes accrued prior to the acquisition of the lands. *Id.*

Article 8, Section 2 of the Constitution provides:

"* * * The Legislature may, by general laws, exempt from taxation public property used for public purposes."

This clause is not self-enacting, but merely authorizes the Legislature to make such exemptions by general laws. Purporting to act under the authority of the above constitutional warrant, the Legislature enacted Article 7150, R. C. S. 1925, which provides:

"The following property shall be exempt from taxation, to-wit: * * *
** * * *"

"4. Public Property.—All property, whether real or personal, belonging exclusively to this State or any political subdivision thereof, or the United States, * * *."

We think it apparent that the Legislature thus attempted to extend the exemption on property owned by cities or other political subdivisions of the State beyond the authorized limit. Section 2, Article 8, authorizes the Legislature to exempt from taxation public property used for public purposes, while the Legislature goes further and exempts "all property *C* * * belonging to any political subdivision of the State" without limiting same, as does the Constitution, to public property used for public purposes.

Therefore, we hold the attempted exemption by the Legislature void in so far as it exceeds the authority granted by the Constitution. If the term of the Statute exempting institutions of purely public charity from taxation embraces institutions or property not contemplated by the framers of the Constitution, the statute is to that extent void. *City of San Antonio vs. Santa Rosa Infirmary*. 249 S. W. 498; S. C., 259 S. W. 926, 931, (4).

Therefore, construing together Section 9 of Article 11 and Section 2 of Article 8, and said Act of the Legislature, we are of opinion that the exemption from taxation to cities should be summarized as follows: All property owned and held by cities for public purposes only, and also used for public purposes.

In passing on this question, our Supreme Court speaking through Chief Justice Nelson Phillips, has said:

"The test (for tax exemption) is whether it (the property in question) is devoted exclusively to a public use." *Corp. of San Felipe de Austin vs. State*, 111 Texas 108, 111, 229 S. W., 845.

Laws providing exemptions from taxation are never favored, and in the construction or interpretation of a law extending exemptions from taxation to any citizen or class of property, all doubts are resolved against the exemption. *Santa Rosa Infirmary vs. City of San Antonio*, (Supreme Court), *supra*.

"In considering exemptions, it is the rule that the law must be strictly construed and not enlarged, but confined to the very terms of the provision as to the exemption. *Cooley on Taxation*, page 357.

"Following this rule, the burden devolves on anyone seeking an exemption to bring himself clearly within the terms of the statute or constitutional provision, and further, should any reasonable doubt as to the property being exempt arise, the doubt must be resolved in favor of the government levying the tax." *Trinity Methodist Church vs. City of San Antonio*, 201 S. W., 669, 670 (1).

"It is also held that the exemption will not be extended by construction or implication beyond the clear import of its terms. There must be no room for doubt or controversy. As said by the Supreme Court of the United States, in *Railroad vs. New Orleans*, 143 U. S. 192 (36 L. Ed. 121: 'Exemption from taxation is never to be presumed. The Legislature itself cannot be held to have intended to surrender the taxing power, unless its intention to do so has been declared in clear and unmistakable words.'" *Millers' Mutual Fire Ins. Co. vs. City of Austin*, 210 S. W., 825-827, (14).

"If more land is purchased than is needed to furnish a water supply, the excess not needed and not used for such purpose is subject to taxation." *West Hartford vs. Hartford Water Comm'rs.*, 44 Conn., 360.

"One claiming exemption from taxation must clearly point out an express constitutional or statutory authority for such exemption." *State ex rel. Taggart vs. Holcomb*, 81 Kans., 879, 28 L. R. S. (N. S.) 251; *Knoxville O. R. Co. vs. Harris*, 99 Tenn. 684, 53 L. R. A. 921.

Many other decisions of other states could be cited to the same effect.

"If an exemption is found to exist, it must not be enlarged by construction, since the reasonable presumption is that the State has granted in express terms all it intended to grant at all, and that unless the privilege is limited to the very terms of the statute, the favor would be extended beyond what is meant." 2 *Cooley on Taxation*, (4th Ed.), pages 1407.8.

If the exemption applies only to property "owned and used", then the *ownership and use* for the designated purpose must concur. *Id* Sec. 680, page 1426, and notes.

From your statement of the facts in this case, there is no question that the City of Abilene acquired, owns and holds the lands in question for a public purpose, to-wit: for the construction of a reservoir with which to supply its inhabitants with water. The real question in the case arises from the fact, as stated by you, that these lands were acquired in the years 1928, 1929, and 1930, but that the lands are not being used for a public purpose and that there are no prospects of their being so used in the near future, but that the same are being rented out for farming purposes. The question then is whether said lands which are owned and held for public purposes, but are not so used, presumably intended to be used for public purposes at some time in the future, are exempt from taxation. Reverting to the rules laid down above for the construction of laws relating to tax exemptions, and to the provisions of our own Constitution and statutes, it would appear, it seems to us, that under the facts stated, said lands are not exempt from taxation. Being rented out for agri-

cultural purposes, we think it may properly be said that they are now held for that purpose, that is, for the purpose to which they are actually put, although there may be a purpose ultimately, or at some future time, to use them for a public purpose. However that may be, it is perfectly clear that said lands are not now used for a public purpose which is made by the Constitution sine qua non of exemption from taxes. The question then is whether a present intention to use said lands for a public purpose at some time in the future comes within the provisions of the law and exempts said lands from taxation.

In the *Young Men's Christian Association of Omaha vs. Douglass County, et al.*, it is alleged that said Y. M. C. A. owned a four-story building, all of which it used for the purposes of the order excepting the lower story which was rented out and the rents used in carrying on the business of the association. It was alleged in substance that it was the intention of the organization to set up the lower floor for baths, gymnasium, etc., for the use of the members of said association, as soon as it could accumulate funds sufficient for that purpose.

In its opinion in the above case, the Court says:

"While there is an allegation that the plaintiffs intended to use the room now rented for public purposes, for offices, gymnasium and other proper and necessary purposes for carrying out the objects of its organization, we do not think such allegation would materially affect the decision of the case as to the present situation and uses to which the property is put, as disclosed by the petition. Intention to use it for such purposes in the future, which would doubtless, when so used, exempt it from taxation, is not a present exclusive use as contemplated by the constitutional and statutory provisions quoted." Cited, *Academy of Sacred Heart vs. Ivey*, 51 Neb. 755, 71 N. W. 752.

In the case of *Washburn College vs. Shawnee County Comm'rs.*, 8 Kans. 344, Mr. Justice Brewer uses the following language:

"Intention to occupy is not equal to occupation, does not tend to prove it. The pleadings recognized the difference, for they admit the failure, while they allege the intention, to occupy. An occupation which is to be—though here it is only it may be—is no present use."

In *First Christian Church vs. Beatrice*, 39 Neb. 432, 52 L. R. A. 166, it is held that the possession and ownership of a lot which is rented, the rent derived therefrom being set apart to constitute a building fund for the purpose of erecting a church edifice thereon which the society had resolved to build, was not a use of the property such as would exempt it from taxation under the provisions of the law referred to.

"It is not whether it is entitled to any exemption, but whether the property claimed to be exempt is exclusively used for the purposes of its organization. In determining this, we are to adhere to a strict rule of construction and the language used granting the exemption." *Cincinnati College vs. State*, 19 Ohio 110; *Stahl vs. Kansas Edu. Asso.* 54 Kansas 542, 38 pac. 796; *State ex rel. Board of Admrs. vs. Board of Assessors*, 35 La. Ann. 668.

In *Cincinnati College vs. State*, supra, it is held:

"The property of literary and scientific societies is only exempt from

taxation when used exclusively for literary and scientific purposes. If used for other purposes, it is liable to taxation although the property is in the future to be applied for the promotion of literature and science."

The law looks at the property as it finds it in use, and not to what is done with its accumulations. *Cleveland Library Ass'n. vs. Pelton*, 36 Ohio State 258. To the same effect *Gerke v. Purcell*, 25 Ohio State 249; *State ex rel. Board of Admis. vs. Board of Assessors*, 35 La. Ann. 668; *People ex rel. Hutchison vs. Collison*, 22 Abb. N. C. 52; 6 N. Y. Sup. C. 711 *Salem Lyseum vs. Salem*, 27 N. E. 672, 154 Mass. 15.

"An intention to use property at some indefinite time in the future for purposes which will render it free from taxation under the laws of the State, does not preclude its taxation before actually used for the purpose warranting an exception." 2 Cooley on Taxation, (4th Ed.), Sec. 687, page 1441; *County of Ramsey vs. Chicago, M. & S. P. Ry. Co.*, 33 Minn. 537, 24 N. W. 313; *Presbyterian Board of Relief vs. Fisher*, 68 N. J. L. 143, 52 Atl. 228; *In Re Allerton*, 296 Ill. 340, 129 N. E. 801.

"If the use determines the exemption, it is the present use and not the intended use in the future which governs." 2 Cooley on Taxation, Sec. 687, page 1442; *Grand Lodge of Masons vs. City of Burlington*, 84 Vt. 202, 78 Atl. 973; *Matter of Mary Immaculate School, etc.*, 188 N. Y. Appeals Division 5, 175 N. Y. Supreme Ct. 701.

From the above authorities, it would appear that lands owned for a public purpose, but which are not so used but are intended at some indefinite time in the future to be used for such public purposes as which when so used exempts them from taxation, are not exempt from taxation until such public use begins.

We have been unable to find a case in which the courts have passed upon the question, but we believe it reasonable that the courts will hold public property held but not actually used for a public purpose exempt while being prepared and made ready for such purpose. That is, if a city acquires land to be used for purposes of a public reservoir to supply water for its inhabitants and within a reasonable time and with due diligence begins the construction of such reservoir and pursues such work to completion and use, we believe such property would be exempt *dum fervet opus*, that is, during such reasonable time of preparation and construction. For this reason, we cannot give you a categorical answer to your question and say whether or not the lands in question are subject to taxation, for the reason that a question of fact may be involved which would determine the issue and upon which this Department is unable to pass, that being a matter to be determined by a court or jury. We merely lay down what we conceive to be the rules of law applicable to the case you state, and we trust that you may be able to decide therefrom the proper course to pursue.

Yours truly,

F. O. McKINSEY,
Assistant Attorney General.

Op. No. 2876

BONDS

Where bond election specifically designates improvements to be constructed, any balance remaining after completion of project should be transferred to interest and sinking fund account.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, December 15th, 1931.

Honorable Sherman White, County Attorney, Gray County, Pampa, Texas

DEAR SIR: We have your letter of November 18, 1931, as follows:

"On June 13, 1927, the Commissioners' Court of Gray County ordered an election to be held in Precinct No. 4, of Gray County to determine whether or not bonds of said District No. 4, in the total sum of \$250,000 should be issued, the funds to be derived from the sale of said bonds to be used for the purposes of building bridges, roads, etc. A certified copy of the petition, hearing, and order of the Commissioners' Court calling the election is enclosed herewith for your attention.

"The election was ordered, held and the bonds of said Road District No. 4, were duly issued by the Commissioners' Court of said county in pursuance of the petition, notice and order calling the election.

"The Commissioners' Court has purchased the road machinery, built all the bridges and the entire program has been completed as contemplated with the exception of the hard-surfacing of Highway No. 75. The original contemplation of the Commissioners' Court and the voting public in said Road District No. 4 was that State Highway No. 75 would be surfaced with concrete paving.

"On February 9, 1931, a petition was presented to the Commissioners' Court of Gray County asking that an election be ordered by said court to determine whether or not bonds of said Gray County in the sum of \$2,250,000.00 should be issued for the various purposes, all of which are set out in detail in the certified copy of the order calling the election, herewith enclosed and here referred to. One of these purposes was to purchase the district roads of said County, among which was the State Highway No. 75, situated in Road District No. 4.

"This election was held and the Commissioners' Court in pursuance thereof declared the result of the election in favor of the execution and issuance of the bonds of Gray County for the various purposes as set out in the petition above referred to.

"The petition asking that an election in Road District No. 4 authorized an expenditure of the total amount of \$160,000.00 in constructing, maintaining and hard-surfacing Highway No. 75, which is situated in said Road District.

"Since the bonds of said Road District have been issued the State Highway Commission has let a contract for the hard-surfacing of State Highway No. 75 with caliche base and asphalt topping, thus reducing the original contemplated expenditure of funds of said Road District in an amount of approximately \$60,000.00, which amount now stand credited to said Road District No. 4, in the County Treasury. The hard-surfacing of this Highway 75 is now in progress and when it is completed, the original program of Road District No. 4 as outlined in the petition above referred to will have been completed with a cash surplus of approximately the above amount unexpended.

"All outstanding bonds of Road District No. 4 have been purchased by the bonds of Gray County or are now in the process of being exchanged by the Commissioners' Court.

The Commissioners' Court has asked:

"1st: Is it proper to transfer the \$60,000 to Gray County Bond Fund.

"2nd: If so, is there any limitation as to how it may be used after transfer—i. e., always assuming it will be used for purposes for which Gray County bonds were issued.

"3rd: If not, what disposition may be made of the money. May it be used for other roads in District No. 4 as originally created.

"4th: If the money cannot be used for road construction, what disposition should be made of it."

You also submit copies of petition for a road bond election in Road District No. 4 of Gray County, notice on such petition, the order of the Commissioners' Court calling the election and notice of election. All of these instruments shown, including the petition, state that "the proposed bonds are to be issued for the purpose of constructing, maintaining and operating macademized, graveled or paved roads and turnpikes, or in aid thereof * * *, and that funds derived from the sale of such bonds shall be expended according to the following schedule:

Highway No. 75, also known as Postal Highway, now designated as Federal Highway No. 66, 16 miles at \$10,000 per mile, or \$160,000, one bridge across McClellan Creek Northwest of Alanreed, Texas, at a point known as Palmar Crossing, on the highway or turnpike leading from Alanreed to LeFors, Texas, county seat of Gray County, \$6,000.00; one bridge crossing McLennan Creek Northeast of Alanreed, Texas, at a point known as Beaver Dam Crossing, on the highway or turnpike leading from Alanreed, Texas, through the oil fields Northeast of Alanreed, thence to LeFors, Texas, Gray County seat, \$22,500; one bridge crossing McClellan Creek North of McLean, Texas, on the highway or turnpike leading from McLean, thence to LeFors, Texas, \$25,000.00; the sum of \$10,000 for machinery to be used for improving and maintaining all highways in said Road District No. 4; the sum of \$26,500 to be used for the construction, maintenance and operation of lateral roads in said Road District No. 4; in addition thereto, any premium or premiums derived from the sale of said bonds to be used for the same purpose."

From the above it will be noted that the Commissioners' Court of Gray County was not authorized to construct roads generally in Road District No. 4, but was directed to construct certain roads and bridges not to exceed a certain set price. In the last item of \$26,500 the particular roads that are to be constructed are not designated but the amount of money to be spent for this purpose is specifically stated.

Before an election can be called by the Commissioners' Court for the purpose of submitting the question of the issuance of bonds for the construction of public roads within a road district, a petition signed by the requisite number of property taxpaying voters of the district, and stating the purpose for which the bonds are sought to be issued, must be presented to the Commissioners' Court. After the petition is presented, the Commissioners' Court gives notice and has a public hearing upon the question of calling the bond election, and it must be shown conclusively to the Commissioners' Court that the proposed improvement will be for the benefit of all the taxable

property in the district. In this instance the hearing was held pursuant to notice duly given upon the specific proposition set forth in the petition and the notice of the hearing. The design of the statute is that the purpose of the bonds shall be stated in such a way as to fairly and fully apprise the voters of it. No particular form is required and the proposition may be general in its terms, but in this instance the petitioners and the Commissioners' Court saw fit to state the purpose not only as to the particular roads to be improved and bridges to be built, but as to the amount of money to be spent upon each project. Since the petitioners and the Commissioners' Court by deliberate action made the proposition as set out in the various instruments the distinct proposition to be voted upon, and since this proposition was carried forward in the election order, notice of election and all other proceedings, it is only fair to conclude that the construction of the specific projects named was the only proposition in the minds of the voters.

It is the well settled law of this State that where the Commissioners' Court enters preelection orders designating the particular improvements to be made, it is bound to construct these improvements. *Moore, et al., v. Coffman, et al.*, 200 S. W. 374; *Black v. Strength*, 246 S. W. 79.

We believe that where a Commissioners' Court has ordered an election for the purpose of making certain specific improvements, any additional funds remaining from the sale of the bonds after such projects have been completed cannot be expended for any other purpose. The Commissioners' Court is to be commended for constructing the contemplated project at a saving to the taxpayers, but as the taxpayers only authorize them to do certain specific things, we believe that the money remaining after the completion of the contemplated project should be returned to the interest and sinking fund the bond issue.

Answering your first question, you are advised that it is our opinion that it is not proper to transfer the \$60,000 remaining to the Gray County construction fund.

Having answered the above question as we have, it becomes unnecessary to answer your second and third questions.

In answer to your fourth question, it is our opinion, and you are so advised, that the money derived from the sale of the bonds remaining after the completion of all the projects as contemplated by the proceedings had in the bond election, should be placed in the interest and sinking fund for the purpose of paying the compensation bonds issued by the county for the purchase of the roads in Road District No. 4.

Very truly yours,

WALTER A. KOONS,

Assistant Attorney General.

Op. No. 2884

DELINQUENT TAX SALES—ARTICLE 7328 R. C. S. 1925—A “BIDDER”
WHEN THE STATE MAY BID

1. A “bidder” at a delinquent tax sale by sheriff is one who bids the amount of the judgment or more.
2. The State may bid in the land unless some person bids at least the amount of the judgment against the land.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, May 16, 1932.

Honorable Frank M. Wilson, Assistant District Attorney, McLennan County, Waco, Texas.

DEAR SIR: Your communication of the 4th instant, addressed to the Attorney General is as follows:

“We are hereby requesting an opinion from your department with reference to the following question on taxation:

“Under Articles 7326 and 7328, 1925, Revised Statutes, is the State of Texas, through its duly authorized agents, permitted to bid the amount of taxes, costs, penalty and interest included in a judgment of foreclosure, where an outside bidder bids a sum less than the amount of said judgment?

“We have five cases in this county in which this question has been raised, it being the contention of the bidders that they will be permitted to bid an amount less than the judgment of the Court under the terms of Article 7328 which provide that the county attorney, etc., may bid the amount of taxes, costs, penalty and interest as authorized by the judgment of foreclosure, “Where there are no bidders” that when an outside bidder bids any amount (less than the amount of the judgment) this will preclude the State through its agents from bidding the amount of the judgment.

“This is an urgent matter from this office as there are now injunction cases pending involving this question. Your immediate response will be appreciated.”

The question you propound is a difficult one to answer. Article 7326 provides for the bringing of suits for the recovery of all taxes, interest, penalty and costs due and for the foreclosure of the tax lien upon lands which are liable for the same. Said article also provides that such suits shall be brought as an ordinary foreclosure for debt with averments as to the existence of a lien upon such land for such taxes, and shall pray for judgment for the foreclosure of said lien and sale of said lands as under ordinary execution.

Article 7328, or so much thereof as is pertinent to your inquiry, is as follows:

“The proper persons, including all record lien holders, shall be made parties defendant in such suits, and shall be served with process and other proceedings had therein as provided by law in ordinary foreclosure suits in the district courts of this state; and in case of foreclosure an order of sale shall issue and the land sold thereunder as in other cases of foreclosure; but if the defendant or his attorney shall, at any time before the sale, file with the officer in whose hands any such order of sale shall be placed, a written request that the property described therein shall be divided and sold in smaller tracts than (than) the whole, together with the description of such smaller tracts, then such officer shall sell the lands in such subdivisions as defendanat may request, and in such case shall sell only as many subdivisions, as near as may be, as are necessary to satisfy the judgment, interest, penalty and costs; and after the payment of the

taxes, interest, penalty and costs adjudged against it, the remainder of the purchase price, if any, shall be paid by the sheriff to the clerk of the court, out of which said execution or other final process issued to be retained by him subject to the order of the court for a period of two years, unless otherwise ordered by the court, after which time the court may order the same to be paid to the State Treasurer, who shall hold same in trust to be paid to the owner against whom said taxes were assessed; provided, any one claiming the same shall make proof of his claim to the satisfaction of the State Treasurer within three years after the sale of said land or lots, after which the same shall be governed by the law regulating escheat.

If there shall be no bidder for such land the county attorney, sheriff or other officer selling the same, shall bid said property off to the State for the amount of all taxes, penalty, interest and costs adjudged against such property, and the district clerk shall immediately make report of such sale in duplicate, one to the Comptroller and one to the commissioners court, on blanks to be prescribed and furnished by the Comptroller. Where the property is bid off to the State, the sheriff shall make and execute a deed to the State, using forms to be prescribed and furnished by the Comptroller, showing in each case the amount of taxes, interest, penalty and costs for which sold, and the clerk's fees for recording deeds. He shall cause such deeds to be recorded in the records of deeds by the county clerk in his county, and when so recorded, shall forward the same to the Comptroller. The county clerk shall be entitled to a fee of one dollar for recording each such deed to the State, to be taxed as other costs. When land thus sold to the State shall be redeemed the tax collector shall make the proper distribution of the moneys received by him in such redemption, paying to each officer the amount of costs found to be due, and to the State and county the taxes, interest and penalty found to be due each respectively.

The question involves the proper construction of the language, "if there shall be no bidder for such land." This means, of course, the particular land which is being sold under order of sale issued on a tax foreclosure judgment. Does the word, "bidder" mean one who bids for the land although he bids less than the amount of the judgment; or does it mean or imply one who bids a sum equal to or exceeding the amount of the State's judgment? I have been unable to find a case where the question has been passed on by the courts, and hence will undertake to answer the same in accordance with what I conceive to be adopted rules of construction.

"Another occasion for construing a statute is where uncertainty as to its meaning arises not alone from ambiguity of language employed, but from the fact that giving a literal interpretation to the words will lead to such unreasonable, unjust or absurd consequences as to compel a conviction that they could not have been intended by the Legislature." 25 R. C. L., Sec. 214, p. 959.

We quote the above because it may be said that the language of the statute, "if there shall be no bidder" is perfectly plain and unambiguous and requires no construction. In this connection, I call attention to the following taken from the same authority, viz:

"It often happens that the true intention of the lawmaking body, though obvious, is not expressed by the language employed in a statute when that language is given its literal meaning. In such cases, the carrying out of the legislative intent, which, as we have seen, is the prime and sole object of all rules of construction, can only be accomplished by departure from the literal interpretation of the language employed. Hence, the courts are not always confined to the literal meaning of a statute; the real purpose and in-

tent of the legislature will prevail over the literal import of the words." 25 R. C. L., Sec. 222, page 967.

Numerous authorities from other states and the United States and some from Texas are cited in support of the above doctrine of the text.

"The paramount rule of construction is to find out the legislative intent, which is the law and must prevail." *Ellis County vs. Thompson*, 95 Texas 22, 32.

"The Legislative intent constitutes the law."

McInery vs. City of Galveston, 58 Texas 334; *Russell vs. Farquhar*, 55 Texas 355; *Rool vs. Wedemyer*, 50 Texas 287; *Dodson vs. Bunton*, 81 Texas 374, 28 S. W., 1061.

"Strictly speaking, there is but one rule of construction, and that is the legislative intent must govern; all other canons of interpretation, so called, are but grounds of arguments resorted to for the purpose of ascertaining the true meaning of the law."

Mills County vs. Lampasas County, 90 Texas 606, 40 S. W. 404; *Imperial Irrigation Company vs. Hayne*, 104 Texas 395, 138 S. W. 575, 581; *Koy vs. Schneider*, 110 Texas 369, 221 S. W. 880.

"The intention of the Legislature in enacting a law is the law itself."

Edward vs. Morten, 92 Texas 152, 153, 46 S. W. 792.

"The great fundamental rule in construing statutes is to ascertain and give effect to the intent of the Legislature." 36 CYC 1106, 2.

We are unable to bring ourselves to the belief that in all cases where the State has a judgment condemning land to be sold for the payment of taxes, the Legislature intended the State should be without the power to protect its interests and that of the county. But it is our opinion that what is meant by the language of the statute, "If there shall be no bidder for such land" the county attorney, sheriff or other officer selling the same, shall bid said property off to the State for the amount of all taxes, penalty, interest and costs adjudged against such property, means that if there is no person who bids the amount of the judgment against said land. Although he may bid less, it is made the duty of one of the officers named to protect the interests of the State by bidding to the extent authorized by the statute above quoted. If any bidder should bid the amount of the State's judgment against the land or more, the State then cannot bid; for in such circumstances the State would be competing as a mere purchaser when it is authorized to go no farther than is necessary to protect its interests.

We think there is language in said Article which tends to support this construction. The Article states that in case of foreclosure, an order of sale shall issue and the land sold thereunder as in other cases of foreclosure. It further provides after the officer executing the order of sale has received the proceeds and from them paid the taxes, interest, penalty and costs adjudged against the land, as to what he shall do with the excess. Nowhere is there any provision prescribing the procedure to be followed in a case where the land does not bring the amount of the judgment against it. In an ordinary foreclosure sale, Article 2218, which relates thereto, provides a procedure in event the proceeds of the property sold does not satisfy the judgment, directing the sheriff to make the balance as under execution, using the unsatisfied order of sale as an execution. No such alternative

is provided for in the statute governing delinquent tax sales under order of sale. From the provisions of the statute directing the sheriff to pay from the proceeds the taxes, interest, penalty and costs, and the "remainder of the purchase price, if any" to the clerk of the court, there arises the clear implication that the land is to bring at least enough to satisfy the judgment. In case the land is bid in for the State, the bid must be for the full amount against the land, and provision is further made that when said land shall be redeemed, "The tax collector shall make the proper distribution of the moneys received by him in such redemption, paying to each officer the amount of costs found to be due, and to the State and county the taxes, interest and penalty found to be due each respectively." So it appears that whether the land is sold to an outside bidder or bid in for the State, provision is made for the ultimate payment in full of the taxes, interest and penalty.

It is obvious that in the event the land is sold to an outside bidder for less than the amount adjudged against it, complications and difficulties will arise, and the Legislature has furnished no guide for their solution. One part of the judgment is State taxes, another part county taxes, and still other sums which go to make up the total of the judgment are composed of costs of different officers. In such a case the judgment could not be paid in full and all the parties at interest could not get all their money. What should be done in that case? Is the State's interest superior to the county's interest or will the money be prorated between them? Are the officers to be paid first, or are their claims to be postponed until the claims of the State and county have been paid? If paid first, it might result that there would not be enough to pay even the costs going to the officers, and there would not be enough left to satisfy the claims both of the State and the county. I think it reasonable to assume that the Legislature intended no such complications; otherwise, it would by appropriate enactment have provided for them.

We are aware that this opinion is in conflict with an opinion sent out from this department on the 6th day of February, 1923, but with such opinion we cannot agree and from it we respectfully dissent. In support of that opinion the holding by the Court of Civil Appeals in *Gibbs v. Scales*, 118 S. W. 188, is quoted from as follows:

"It will be noted that the statute quoted above requires the land to be bid in for the state only when there are no bidders for the same, thus evidencing the policy of the state to become the purchaser only when it is necessary to do so in order to collect the taxes due."

We submit that the holding above quoted does not militate against our conclusion, but, on the contrary, tends to sustain it. If the language of the statute evidences the policy of the State to become the purchaser only when it is necessary to do so in order to collect the taxes due, then the converse is true and the policy of the state is that it may become a purchaser when that is necessary in order to collect the taxes due. The only way provided by which the taxes due may be collected in every case is to permit the State to bid an amount sufficient to cover the same in event no other bidder does so.

We submit that this question was only incidentally involved in the Gibbs case. In that case the county attorney bid the land in his own name and took title thereto. But it is inferable, although not directly stated, that there were other bidders and that the bid of the county attorney amounted to at least enough to satisfy the State's judgment. The real question was whether the county attorney had the right to buy the land or not. The Court of Civil Appeals held in the Gibbs case that he did have such right, but this holding seems to be overturned by an opinion of the Commission of Appeals in *Orr vs. Wallace*, 296 S. W. 871.

We think our conclusion is entirely consistent with the established doctrine that a tax sale may be set aside for gross inadequacy of price and any slight irregularity. *Orr vs. Wallace*, supra. In a sale by a sheriff the price paid may be so grossly inadequate that a court of equity will not consider it a valuable consideration, nor the purchaser a bona fide purchaser within the meaning of the law. This was held in the case where land worth in the neighborhood of \$8,000.00 was sold for \$5.00. *Nichols vs. Crosby*, 87 Texas 445, 453; *Lisner vs. State Mortgage Corporation*, 29 S. W. (2d) 849, 853.

Assume that the State has judgment foreclosing a tax lien to the amount of \$250.00 on land worth \$5,000.00. Suppose that at the sheriff's sale the sum of \$10.00 is bid by an outsider, and the land is knocked off to him. Under the construction which we are combating, and in accordance with what may be the literal language of the statute, the State's hands would be tied and its officers could only stand by, helpless, and see the State's interests sacrificed in that manner. After the sale, it would be the duty of the sheriff to execute a deed to the purchaser and then the taxpayer would have two years in which to redeem his land and he could redeem it by paying double the amount of such bid. Such a thing could easily happen and no doubt has happened heretofore. We cannot believe that the Legislature intended any such absurd results.

We reiterate our conclusion, in answer to your question, that by the term "bidder," used in the statute giving the State the right to bid in lands sold under a tax judgment, the Legislature meant a person who bids at least the amount of the judgment against the land, taxes, interest, penalty and costs, and if no such bidder appears, then the proper officer may bid in the land for the State as the law provides; and that no person would necessarily be considered a "bidder," within the meaning of the statute, so as to preclude the proper officer from bidding same in for the State, unless his bid is for a sum at least sufficient to satisfy the judgment against the land.

Yours very truly,

F. O. MCKINSEY,

Assistant Attorney General.

Op. No. 2885

TAXATION—WATER RIGHTS GRANTED BY BOARD OF WATER
ENGINEERS TAXABLE

1. The permit granted a power and light company to dam and use the waters of a river, when exercised, creates an easement and such an interest in land as is subject to taxation.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, May 19, 1932.

*Mr. V. K. Randle, County Auditor, Gonzales County, Gonzales,
Texas.*

DEAR SIR: You state that the Texas-Hydro-Electric Corporation, located at Seguin, Texas, owns and operates two power dams in Gonzales County; that said company has constructed transformers and other machinery or appliances for the production and transmission of electric current to other points for light and power. You desire to know whether or not the dam and other structures or appliances are a proper subject for taxation.

From the records of the Board of Water Engineers it appears that said Hydro-Electric Corporation owns certain rights and privileges granted by said Board of Water Engineers, the permit for the same being dated July 25, 1914, said permit being as follows:

“Permit to The Guadalupe Water Power Company.

“Dated July 25, 1914.

Grants “perpetual right and authority to construct, own and operate dams, lakes, reservoir and pipe lines and power houses, penstocks and all needful appurtenances on the Guadalupe river, and in, on and across the bed of said streams and the banks thereof between the city of Gonzales and the town of Waring, for the purpose of developing water power and of carrying out its charter powers and functions, and to that end is granted the use of the waters of said Guadalupe river and the right to impound the flood waters of said Guadalupe river and the right to impound the flood waters of the north forks of Johnson’s and Minter’s creeks, and all other creeks, canyons, arroyos and other natural carriers of water entering into said Guadalupe river above a point located six miles below the city of Seguin in Guadalupe County and extending in a northwesterly course through Guadalupe, Comal, Kendall and Kerr Counties, etc.”

It also stipulates, * * * the grant and rights herein extended are full and conclusive” (for power purposes).

Permit Record of the Board of Water Engineers, Vol. 1, pp. 24, 26.

Said permit was originally granted to the Guadalupe Water Power Company, but by mesne conveyance has been transferred to and is now owned by said Texas-Hydro-Electric Corporation.

The question involved herein is whether or not the rights, privileges and improvements held and owned by said Texas Hydro-Electric Corporation in Gonzales County are “property” within the meaning of the law, and therefore, subject to taxation.

Section 11 of Article 8, Constitution of this State, provides that all property, whether owned by persons or corporations, shall be assessed for taxation.

Article 7145, Revised Statutes, 1925, provides:

"All property, real, personal or mixed, except such as may be hereafter expressly exempt, is subject to taxation, and the same shall be rendered and listed as herein prescribed."

Article 7146, Revised Statutes, 1925, in defining real property, does so in the following words:

"Real property for the purpose of taxation, shall be construed to include the land itself, whether laid out in town lots or otherwise, and all buildings, structures and improvements, or other fixtures of whatsoever kind thereon, and all the rights and privileges belonging or in any wise appertaining thereto, and all mines, minerals, quarries and fossils in and under the same."

If the rights and privileges granted to said corporation amount to an easement or an actual interest in the land, it would seem that it comes within the definition of real estate and, therefore, subject to taxation. It may be that the naked right or permit to impound and use the waters of a river is but a license, but, if in pursuance of such, possession is taken of the river bed, dams built, its water impounded and actually used and appropriated, it would seem that there is more than a mere license by the exercise and the possession of other rights in and to the land itself such as to amount to an interest therein.

"An easement is more than a mere personal privilege. It is an interest in the land * * *. An easement is property within a constitutional provision that no person shall be deprived of his property without due process of law. 9 R. C. L., Sec. 3, p. 736.

The rights acquired by the said corporation in the river bed and the waters thereof are very similar to those acquired by a railroad in the lands constituting its right-of-way when acquired only for railroad purposes. It is the right to take exclusive possession of and to use exclusively for its legitimate purposes the land in question.

"Water in canals for irrigation purposes in real estate, and the land-owner's right to the use of a portion thereof is a servitude upon such real estate." *Mudge vs. Hughes* (Civil App.), 212 S. W. 819.

"Permanent water rights evidenced by grants or certificates are easements appurtenant to the land." *Edinburg Irr. Co. vs. Paschen* (Com. App.), 235 S. W. 1088.

By articles 1435 and 1436, Revised Statutes, 1925, electric light and power companies are granted the power to own, hold and use such lands, right-of-way, easements, franchises, buildings and structures as may be necessary for the purpose of such corporation, and also the right of eminent domain.

In order to determine the character of rights which are granted to power and light companies by the Board of Water Engineers, and that are enjoyed by them under such grant, let us consider the elements composing them.

In the first place, there is a grant made to the power and light company in this case by the Board of Water Engineers, acting by authority of law. The permit issued gives the power and light company the right to take possession of the water course, construct dams across the same and build and maintain necessary structures to be

used in connection with the development and distribution of power in its business. We submit that this permit, with the acceptance and exercise of the rights and privileges thereby granted, creates an estate in the land. It creates what is called, in law, the dominant estate, the fee held by the State being the servient tenement or estate. In other words, the power and light company, in this case, holds what is termed, in law, an easement, which is an estate in land and is such an interest as is subject to taxation. It is of the same character as the interest and estate held by a railroad company in its right-of-way.

There are numerous decisions describing and defining the easement which a railroad company holds in its right-of-way, some of which will be quoted as applicable here.

“The words ‘right-of-way,’ if not defined, are expressive of the very nature of the right ordinarily held by railway companies in the land over which their road runs—a right to use the land only for railway purposes—an easement.” *Calcasieu Lbr. Co. vs. Harris*, 77 Tex. 12, 23.

“The right-of-way acquired by a railway company does not include the fee simple estate.” Articles 6339 and 3270, Revised Statutes, 1925.

(An easement) “though incorporeal, is an interest in land, and must be created by grant, covenant or agreement, express or implied,” *Settegast et ux. vs. Foley Bros. Dry Goods Co.*, 114 Tex. 452, 270 S. W. 1014, 1015 (1).

“An easement is an interest in land and, therefore, real estate, within the meaning of the statute of frauds. It must be created by grant, and cannot be created by parol. An ‘affirmative’ easement is one which gives to the owner of the dominant tenement the right to use the servient tenement, or to do some act thereon which would otherwise be unlawful.” *Miller vs. Babb* (Com. App.), 263 S. W. 253, 264 (2), (3-6).

“Though the railway company acquired only an easement over the land, the fee remaining in the original owner, the property rights of the railway company were separate and distinct from the owner of the fee, and are separately taxed.” *School Dist. No. 4 vs. School Dist. No. 84* (Ark), 124 S. W. 238.

It is the opinion of this department that the rights and privileges owned, exercised and enjoyed by said Texas Hydro-Electric Corporation in the river bed of the Guadalupe river, described in its permit, constitute real estate as defined in Article 7146 of our statutes and is subject to taxation.

Gonzales County, of course, could tax only that portion of said property located in that county. In assessing the property, the easement, structures, permanent improvements and fixtures, and every other element which affects the value of the holdings, should be taken into consideration in estimating and determining the value of the property. All those things mentioned are considered as a part of the land or real estate, just as the house, fences and other improvements are considered a part of a farm in estimating the value of the land.

Yours truly,

F. O. MCKINSEY,
Assistant Attorney General.

Op. No. 2886

TAXATION—BANKRUPTCY—TAXES DUE BY BANKRUPT A
PREFERRED CLAIM

All taxes legally due and owing by the bankrupt have priority of payment over dividends to creditors.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, May 24, 1932.

Mr. Frank B. Voight, County Attorney, Comal County, New Braunfels, Texas.

DEAR SIR: Your letter of the twentieth instant, addressed to the Attorney General has been duly received. You propound the following question:

“Will you please furnish me with an opinion, whether or not a ‘State and county tax lien on personal property, assessed by the bankrupt prior to his adjudication of a bankrupt, and which taxes were not due and payable until after the adjudication of the bankrupt, and which could not have been paid by the bankrupt because neither county nor State tax rate had been made for the year up to the time of the adjudication of said bankrupt: is a provable claim in bankruptcy?’

“A’ on the 1st day of January made his assessment of his merchandise stock, and on the 21st day of July of the same year, and before the fixing of the State and county tax rate, ‘A’ was adjudged a bankrupt, and thereafter, on the 1st day of January of the succeeding year, the tax collector filed his claim with the bankruptcy court for the amount of the personal taxes owing by the bankrupt ‘A’.

“The trustee takes the position that the claim filed by the State and county is entirely out of line for the reason that the claim had not matured for the reason that the bankrupt could not have paid the taxes, even if he had wanted to, because the State and county tax rate had not been ascertained and because the same were not due and payable until October, three months after the adjudication of the bankrupt.

“Remington on Bankruptcy, Vol. 6, par. 2787, has this to say: ‘Taxes assessed against the bankrupt before bankruptcy, although not payable until after adjudication, are, nevertheless, due and owing.’

“Is this case such as would come within the purview of Art. 7269, Revised Civil Statutes of Texas, and would it have been necessary in this case for the tax collector to have first levied upon the property in order to make his claim a provable claim in bankruptcy?”

Under the provisions of Article 7269, Revised Statutes, 1925, taxes are made a preferred claim against any insolvent who has made an assignment of his property for the payment of his debts or where his property is levied upon by creditors.

It makes no difference whether the taxes are due or whether the precise amount of same was ascertainable at the date such an assignment or such a levy was made. The State has what amounts to a lien upon the estate of the insolvent for the payment of taxes. The rights of the State, at least inchoate, to look to the property and its owner for taxes, begin on the first day of January of any year. When the amount of the taxes is ascertained, the lien of the State thereon, or the rights of the State to collect, relate back to the first day of January.

The case of *C. B. Carswell & Company v. Habberzettle*, 87 S. W. 911, involves practically the same question as is raised here. The owner rendered his property for taxes and later, in the same year, on April 16, 1900, conveyed the property by warranty deed. The vendor died and the vendee paid the State and county taxes, including penalties, interest and costs, and later presented the amount paid as a claim against the estate of deceased. The administrator resisted the payment of said claim on the ground that, at the time his intestate conveyed the property by warranty deed, no taxes were due.

The Court of Civil Appeals overruled this contention and held that the taxes, although not due at the time, were a debt, the personal obligation due by the owner from and after the first day of January, using the following language:

“All property owned by a person in this state on the 1st day of January must be listed for taxation between that date and June 1st of each year; and, notwithstanding, the taxes do not become due until the first day of October following, he is personally liable for the taxes of that year, though he sells the property before the amount of such taxes has been ascertained, and before the payment thereof becomes due. * * * This lien attaches and the taxes become an incumbrance on the land from the date liability is fixed on the owner, which is the first day of January of the year, although the amount of said taxes is not fixed and determined until sometime subsequent thereto.”

In no case is the amount of ad valorem taxes due by any taxpayer definitely fixed until the Commissioners' Court, sitting as a Board of Equalization, meets and inspects the lists of renditions and corrects and approves the same. Then, and not until then, are even the values of the property, upon which the amount of taxes are to be computed, fixed.

The rate of taxation for county purposes may not be fixed until after the fifteenth day of July of each year. This is by reason of Article 7042, which requires the tax assessor to certify to the Comptroller, on or before July 15, showing, as nearly as can be ascertained from his inventories and assessments, the total amount of property in his county subject to taxation. Then, by Article 7045, the Commissioners' Court is to meet at any time after the tax assessor has forwarded said certificate to the Comptroller and at any time before the tax collector begins to write out his receipts for taxes to calculate the rate and adjust the taxes levied in the county for general purposes. It is evident that this may be done at any time before October first, when the payment of taxes may begin.

It is illogical and unreasonable, and contrary to the authorities cited, to say that taxpayer owes no taxes, or that same is not a claim or debt against him or his property, until the amount of the taxes is definitely ascertained or ascertainable.

In addition to the State statute making taxes a preferred claim in the case of an insolvent, the United States Code provides a similar preference in Volume 11, Title 11, U. S. C. A., Section 103, as follows:

"The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment, he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court."

It appears from the foregoing that there are but three matters relating to the payment of a claim for taxes which can arise: (1) Is it a tax? (2) Is the amount correct? (3) Is it legal?

No such questions, it seems, arise in this case. The owner rendered the property, and the proper authorities later fixed the rate or rates of taxation; so, I take it, there is no dispute either as to the legality or the amount of the taxes. Being an ad valorem tax, there can be no question that the claim is such as comes within the designation, taxes.

The Courts of the United States have passed upon various features of this statute and have universally sustained the same.

"Taxes legally due and owing by the bankrupt to the United States, or to any state, county, district, or municipality, are entitled to priority of payment under the express provisions of paragraph (a) of this section." *New Jersey vs. Anderson*, 203 U. S. 483, and many other cases cited under Section 104, p. 74, Sec. 5 of the above statute.

A city's claim against a bankrupt for taxes assessed against him, is entitled to priority of payment by the trustee, though the property on which the taxes were levied never came into the hands of the trustee. *Waco vs. Bryan*, 127 F. 79; *Chattanooga vs. Hill*, 139 F. 600.

A claim for a tax on bankrupt's exempt property is entitled to the preference, although, under the law, exempt property cannot be administered or taken possession of by the bankrupt court. *In re Baker vs. American Bankr. Rep.*, 526; *In re Tilden*, 91 F. 500; *In re Prince*, 131 F. 546.

From the foregoing, and other cases which might be cited, the claim of the State and county for taxes is not one in rem, but is a personal claim against the bankrupt and entitled to priority of payment out of any moneys belonging to an estate.

"The Bankruptcy Act does not withdraw the estates of bankrupts from the reach of the taxing powers, and they are subject, in consequence, to the payment of taxes imposed while they are in the hands of the trustee, *the same as if they were not*. Even though accruing after bankruptcy, taxes must be regarded as within the meaning of the statute, and entitled to priority, the same as those which antedated it. *In re Prince*, 131 F. 546; *In re Flynn*, 134 F. 145.

"The statute does not make funds in the hands of trustees in bankruptcy exempt from taxation, and the courts will order the trustees to pay all taxes which might have been assessed and collected had not bankruptcy supervened, and to which similar property in the same locality is subject." *In re Sims*, 118 F. 356; *Swartz vs. Hammer*, 120 F. 256, affirmed 194 U. S. 441, 48 L. Ed. 1060.

In Re Conaim, 100 F. 268, the court said:

"The manifest intent of the law is that, while the estate is in the hands of the trustee, his custody shall not constitute a barrier to prevent the collection of taxes which would be collectible under the law if the property had remained in possession and control of the bankrupt himself.

The foregoing decisions of our Federal Courts have been cited to show that the policy of the law is for bankrupt courts to see to it that all local taxes are paid. The courts even hold that property in the custody of the bankrupt court and in the possession of a trustee is properly assessed for taxes which accrued during the bankruptcy and that such taxes come within those which are given priority of payment. This being true, then a priori, should the court enforce the payment of taxes which accrued before bankruptcy and are an undisputed claim against the bankrupt himself.

The decisions above cited hold that bankruptcy does not constitute a barrier against the collection of taxes, but that the court should order all taxes due by the bankrupt paid and that same are collectible just as if bankruptcy had not supervened and the bankrupt had continued in the possession and control of his property.

If this bankruptcy had not occurred, and his estate or property had continued in his possession and control, there can be no doubt that the payment of the taxes in question could have been enforced against him and his property. That being true, the courts make that the test of the collectibility of taxes in bankruptcy proceedings.

Other arguments and authorities could be made and cited to show that, under the law, if the estate of the bankrupt is sufficient for the purpose, all State and county taxes should be paid as a preferred or first claim.

Yours very truly,
 F. O. MCKINSEY,
 Assistant Attorney General.

Op. No. 2889

TAXATION—TAXATION OF HOMESTEAD DONATION—WHEN TAXABLE.

1. Where a homesteader settles on public land, causes same to be surveyed, and files in the Land Office his application and the field notes, and has occupied and cultivated said land for three consecutive years, said land then becomes subject to taxation, although proof of occupancy has not been filed and patent therefor has not issued.

2. Under the above facts, title to such land "is not still vested in the State of Texas," so as to render the same exempt from taxation.

OFFICES OF THE ATTORNEY GENERAL,
 AUSTIN, TEXAS, August 3, 1932.

Honorable Geo. H. Sheppard, Comptroller, Public Accounts, Austin, Texas.

DEAR SIR: We are in receipt of your letter of July 19, 1932, addressed to the Attorney General.

Accompanying your letter is one written by J. C. Pangle to Harry Easters, and a letter from W. B. Abney, an attorney at Lampasas, Texas, to J. C. Pangle. These letters contain what purport to be the facts in this case, upon which the question of law propounded by you arises.

The facts as stated are, in brief, that A. S. Bruton was granted a

homestead donation in accordance with Articles 3939 and 3940, Revised Statutes of 1879. Mr. Bruton settled on the eighty or eighty-five acres of land in controversy, which is located in Burnet County, made application in due form to the county surveyor to have said land surveyed, and same was surveyed in due time, and said application and field notes were transmitted to and filed in the General Land Office in proper time.

Said Bruton continued to occupy said land for the necessary period of three years. It was then transferred by Bruton to Collins, and by Collins to Cook. Proof of occupancy was filed in the Land Office July 13, 1894, and patent was issued September 19, 1894, for eighty-five acres of land.

The statement, in the correspondence referred to, that the land as resurveyed November 16, 1893, and corrected field notes filed showing the tract to contain eighty acres does not correspond with the records in the Land Office. The files and records in the Land Office show that the application and field notes were filed in that office January 29, 1884, said field notes showing said tract to contain eighty-five acres. They further show that the proof of occupancy and transfers were filed in the Land Office July 13, 1894, and that patent for said land was issued on the original field notes on September 19, 1894, said patent calling for eighty-five acres. No other or corrected field notes were filed in the Land Office, and a comparison of the original field notes with those set out in the patent shows that the two are identical.

The above tract of land was assessed for taxes for the years 1890 and 1891, and the question which you propound is, in substance, whether, under the facts and circumstances stated above, said land is or was taxable for those two years.

It is the contention of the owner, Harry Easters, and of his attorney, W. B. Abney, that said land was not subject to taxation. Mr. Abney's contention is stated as follows:

"I have advised Mr. Harry Easters, the present owner of said land, that said land was not subject to taxation for the years 1890 and 1891. My reasons for this opinion are as follows:

"*First.* By act of August 21, 1876, and of March 20, 1879, which was in force down to 1895, only the improvements on land where the title remained in the State was subject to taxation and such improvements were assessed as personal property. This statute was in harmony with the case of Pitts vs. Booth, 15 Texas 453, and this case and the principle announced therein was re-affirmed in the case of Abney vs. State, 47 S. W. 1043, and in this latter on page 1044 it was announced 'that lands are not taxable until a patent can be demanded.' As this land was not ready for patenting until after the corrected survey was made in November, 1893, the land was not subject to taxation in 1890 and 1891."

The statute of 1879, which has been substantially the same ever since, provides that all property, real, personal or mixed, except such as may be hereinafter expressly exempted, is subject to taxation, and the same shall be rendered and listed as herein prescribed. Then, as to what the term "real property" shall include, for the purpose of taxation, is defined the same as in the present statute (Article 7146,

R. S., 1925), and includes "all the rights and privileges belonging or in anywise appertaining thereto."

The definition of personal property in the Revised Statutes of 1879 and extending down to the present (Article 7147, Revised Statutes, 1925), contains the following language:

"All improvements made by persons upon lands held by them, the title to which is still vested in the State of Texas, or in any railroad company, or which has been exempted from taxation for the benefit of any railroad company or any other corporation, or any other corporation whose property is not subject to the same mode and rule of taxation as other property."

The contention of Mr. Abney seems to be that in the years 1890 and 1891 the title to this land was still vested in the State of Texas and, therefore, the state could not in any event levy and collect taxes on anything more than the improvements. In other words, that the claimant of the land did not have, in said years, such title and ownership as would make the same subject to taxation.

In the first place, the statute does not undertake to state what is meant by the expression "all improvements made by persons upon lands held by them, the title to which is still vested in the State of Texas," etc. We shall discuss the question as to when the title to land ceases to be "vested in the State of Texas" in such manner as to render the land not subject to taxation.

We submit that the authorities cited by Mr. Abney, and relied on to show that this land is not subject to taxation, are by no means conclusive.

In the case of *Abney v. State*, 47 S.W. 1043, the facts were that a Confederate land certificate for two sections of land was issued to one Priest. The law required the grantee to locate said land in two sections. After same had been located, it was the duty of the Land Commissioner to select one of said sections for the State, the other one then becoming the property of the owner of the certificate. Taxes were assessed against one section of said land for the years 1886 and 1890, and suit was brought to recover said taxes. The Land Commissioner did not exercise his right of choice and did not choose or select the section which should belong to the State until after 1890. It was contended, and the court held, that at the time said taxes were assessed the survey which the claimant owned had not been determined; that no title had vested in him to either of said sections. The court held:

"The locator, for obvious reasons, could not make his own selection and obtain patent for the survey selected by him, but that the duty of selection devolved upon the commissioner of the general land office. The locator could not demand a patent to the particular survey he may have intended for himself. Until the commissioner acted, there was no severance of land from public domain, and no divestiture of the state's title. It remained in the state, and was not taxable."

In the case of *Wm. C. Pitts et al v. James Booth, Guardian*, 15 Texas 453, the land involved was located, first, by virtue of a conditional head right certificate to Geo. W. Edwards, issued by the Board of Land Commissioners of Bexar County.

In 1842 Edwards conveyed the land by general warranty deed to Edward Dickinson. In accordance with the law then in existence, the Board of Land Commissioners for Gonzales County, in lieu of said conditional certificate, issued an unconditional certificate to the heirs of Edward Dickinson on the 28th day of August, 1854, on which last certificate patent issued to the heirs of Dickinson on the 18th day of October, 1855.

Taxes were assessed against said land in the name of Geo. W. Edwards for the year 1848, and the tax deed, procured on sale for said taxes, was the title on which one of the parties to said suit based his claim to the land.

It was held in that case that the land was not taxable until the unconditional certificate was given by the Board of Land Commissioners in August, 1854. The court said:

"It is not believed that lands are taxable before a grant or patent has issued, with the exception of those held by certificate and survey, ready to demand a patent."

A conditional head right certificate would not entitle grantee to land until the conditions named therein were fulfilled or complied with. Those conditions usually were taking up a permanent residence in the State and maintaining same for at least three years by the grantee and his family. In order to secure the unconditional certificate, which was granted to the heirs of Edward Dickinson by the commissioners for Gonzales County, it was necessary to prove that all the conditions named in the conditional certificate had been performed or complied with. Until that was done, and the permanent certificate issued in lieu of the conditional one, a patent could not be demanded. The locator, up to that time, had not shown, and, in fact, was not himself the owner of the land on which the certificate was levied, himself entitled to a patent thereto.

As stated, the above case by no means is conclusive of the question involved here. We submit that the principle announced in that case is by no means in conflict with the claim of the taxing authorities that the tract of land in question in this case is subject to taxation.

When A. S. Bruton made his application to have the land in question surveyed as a homestead, and settled on the same, and said land had been surveyed and proper field notes to the same, together with the application, were filed in the General Land Office; and when said Bruton had occupied and cultivated said land as a home for three years, said tract of land was thereby, and then became, segregated from the public domain, and all except the naked legal title became vested in him. He, and not the State, was then the owner of said land. His interest and title in such land was subject to taxation.

Let us review some of the authorities on this proposition.

"The right of a person who locates a valid certificate on public domain and causes the same to be surveyed, and survey and certificate returned within the time prescribed by law, is a vested right and entitled to protection." *Snyder vs. Mathvin*, 60 Tex. 487, 499.

Logue and wife purchased land from the state as school land. They lived on same as their homestead for three years and filed proof of

occupancy within the time prescribed by law. They then mortgaged the entire section to secure a debt. The mortgage was foreclosed and the land sold under power of sale and was bid in by the mortgagee. He filed suit in trespass to try title and recovered all of said section except the homestead of two hundred acres. The land had not been patented. Held, the sale passed title.

After the steps prescribed by law had been taken by purchasers, such land was no longer public domain, but was subject to seizure and sale under execution. *Logue v. Atkeson et ux*, 80 S. W. 137, 140.

The case of *Phillips v. Campbell*, 146 S. W. 319, appears to be in point.

In that case S. C. Minor settled upon public domain, applied for survey of one hundred and sixty acres for the purpose of a homestead. The survey was made, the land occupied for three years by said Minor and family as a home, and proof of occupancy was attempted to be made, but was held by the Land Commissioners to be insufficient, in that it was not in compliance with the requirements of the statute.

Afterwards Minor conveyed the land to one C. E. Slaton, who conveyed it to Mrs. Phillips. Proper proof of occupancy was later made and patent issued to the land. Before the issuance of the patent, and before the proper proof of occupancy had been filed in the Land Office, S. C. Minor, the homesteader, and wife, on, to-wit, March 21, 1892, conveyed the land in question to R. W. Campbell.

In a suit between R. W. Campbell, the first grantee, and Mrs. Emma Phillips and husband, holding under the conveyance made after the land had been patented, the former prevailed in the suit. In the opinion in said case the following language is used:

"The statute evidently contemplates that occupancy under a homestead claim shall confer a right which may be assigned, and that such assignment may be made in advance of the completion of the statutory term of three years. Upon the completion of three years of continuous occupancy, the settler, or his assignee, has a vested right in the fee simple ownership of the land, and may demand of the proper officer a patent investing in him the legal title. *Robert vs. Trout*, 35 S. W. 323. When Minor conveyed his interest to Campbell, *he owned the land*, but had not acquired the naked legal title from the state." P. 320.

It seems to be the contention of counsel that Bruton was not in a position to demand a patent to the land in controversy because there still remained something for him to do before a patent could issue, to-wit, file his proof of occupancy in the Land Office.

On that point we quote from said opinion (*Phillips v. Campbell*, p. 322) as follows:

"At the time the deed from Minor to Campbell was made, Minor had completed the period of occupancy required by law, and all that remained to enable him to demand a patent from the state was the proof. This had been made by an affidavit held to be defective by the Commissioner of the Land Office; *but in any event Minor was then the owner of the land*. His interest was such as could be conveyed only by a written instrument."

It is clear from the foregoing that the settlement, application, survey filed, field notes and three years occupancy of the land, are the

facts which segregate said land from the public domain and make Bruton, the settler, the owner of the land. If Bruton, at the end of his three years occupancy, regardless of whether he had filed proper proof of such occupancy or not, "was then the owner of the land," then the title to said land was not "still vested in the State of Texas" within the meaning and contemplation of the statute; and, hence, the land itself, and not merely the improvements thereon, was taxable.

In the case of *Riggs v. Baleman et al.*, 228 S. W. 179, an opinion by the Commission of Appeals shows that to have been a homestead preemption case, and uses the following language:

"We think, also, that as between the parties to this suit the facts, as above stated, show as a matter of law such a compliance by Birchfield with the terms of the statute then in force to vest in him fee simple ownership in the land, thereby segregating it from the mass of the public domain, thereby rendering it the subject of private contract." Citing *Phillips vs. Campbell*, 146 S. W. 319.

In the case of *Pitts v. Booth*, 15 Texas 453, objection was made to the introduction of the patent to the land in controversy on the ground that the patent issued after the suit was filed. The opinion holds:

"The objection would be good if the issuance of the patent gave the right of action. But where the right of action existed before, and the patent only affords more conclusive evidence of the right, its introduction was proper enough. Particularly, when the patent issued upon evidence of a right existing before the commencement of this suit."

So, by analogy, we insist that the proof of occupancy of preempted land is merely the evidence of facts which already exist, to-wit, three years occupancy of the land. It is such occupancy that creates the right and not merely the evidence in the form of an affidavit of occupancy.

We submit that the opinion in the case of *Taber et al v. State*, 85 S. W. 835, is analogous and strongly supports the conclusions stated in this opinion.

In the first place it was held in the case of *Daugherty v. Thompson*, 71 Texas 192, that lands which had been granted to the several counties as public school lands are exempt from taxation.

In *Taber v. State*, supra, Dallas County sold her school lands, which were located in Archer County, to B. C. Taber, who, in turn, conveyed a one-half interest therein to J. B. Wilson. The sale was wholly on time and the contract entirely executory. The price of the land was \$2.00 per acre, payable in twenty years, with interest payable semi-annually, stipulating that if default was made in any payment of interest when due, or the payment of principal, the contract was to become null and void and the land, with improvements thereon, to become the property of Dallas County.

Under the decisions of our courts, the superior legal title to the land remained in Dallas County. The State of Texas brought suit against Taber and Wilson for \$442.90, being the taxes on said land for the year 1902, and asked foreclosure of the tax lien.

The contention of the defendant was that inasmuch as Dallas County was still the owner of said lands, under the land, and since said lands, while owned by Dallas County, are exempt from taxation, said lands were not subject to the taxes sued for.

In disposing of that question the court used the following language :

“That our tax laws should be construed as they long have been, to require the vendee holding lands under an executory contract of sale to pay the taxes assessed against such lands, we entertain no doubt. Lands so held are subject to execution as the property of the vendee, and the title of such vendee will support an action of trespass to try title. The fact that a county is the vendor ought not to change the legal status of such vendee. True, it has been held that county school lands, so long as they remain the property of the county, are exempt from taxation, even in the hands of the lessee (Daugherty vs. Thompson, 71 Tex. 192, 9 S. W. 99); but after the lands are sold by the county they become the property of the vendee for purposes of taxation, as well as of execution even though the sale be on a credit, and the contract executory. It would certainly be unreasonable to treat a county selling its school lands on a credit as owner both of the notes or obligation taken for the purchase price and of the land. True, the county is not entirely divested of title to the lands until they are finally paid for, but until a forfeiture or rescission takes place on account of the default of the purchaser the purchaser is to be regarded as the owner, and the lands may be sold for taxes as his property.”

In the above case, under numerous decisions of our courts, Dallas County retained the superior legal title to said lands, and, upon default of the contract by the purchaser, could have maintained its suit in trespass to try title and could have recovered said lands in that action. If that were not such title as would exempt the lands from taxation, then, for a stronger reason, after the settler had so far complied with the requirements of the law as to sever the land from the public domain and to make him the owner of it, it ought not to be said that the title to said land was still vested in the State, so as to exempt the land from taxation.

It is the opinion of this department, and you are accordingly advised, that the tract of land in question was subject to taxation for the years 1890 and 1891, and the fact that proof of occupancy was not filed, and that the patent did not issue until a later date, would not affect the question or render the land exempt from taxation.

After a homesteader has done everything which, under the decisions, is necessary to segregate land from the public domain and invest him with the full ownership thereof, it is not reasonable that he could save said land from taxation indefinitely by merely sitting down and neglecting or refusing to file proper proof of his occupancy in the Land Office, because the statute, in such cases, stipulates no time within which such proof of occupancy must be filed.

Yours very truly,

F. O. MCKINSEY,
Assistant Attorney General.

Op. No. 2891

SITUS FOR TAXATION OF TANGIBLE AND INTANGIBLE PROPERTY STATED PURCHASER OF PERSONAL PROPERTY OWES TAXES ON ITS FULL VALUE, ALTHOUGH SAME IS ENCUMBERED BY LIENS FOR PURCHASE MONEY—VENDOR OF PERSONAL PROPERTY, WHO RESERVES TITLE UNTIL PURCHASE MONEY IS PAID, IS ONLY A LIEN HOLDER AND NOT AN OWNER OF THE TITLE—TAX ASSESSOR NOT AUTHORIZED TO GO INTO PRIVATE PAPERS OF TAXPAYER WITHOUT PERMISSION

1. Tangible and physical property is taxable where it is actually situated.

2. Credits and other intangible property are taxable at the domicile of the owner, and not necessarily at the place where evidence of same is actually situated.

3. The owner of personal property must pay taxes on its full value, although same is encumbered for a part or all its value, no deduction being permitted for such liens.

4. Although a person holding matured lien on personal property delays repossessing same on his debt until after January 1, for the purpose of avoiding the payment of taxes thereon, he is not thereby rendered liable for such taxes.

5. Neither Article 7183 or 7184, nor any other provision of the statutes, authorize a tax assessor, without permission of owner or agent, to take possession of and examine books or papers of a taxpayer in order to discover property.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, March 24, 1932.

Honorable Moore Lynn, State Auditor and Efficiency Expert, Austin, Texas.

DEAR SIR: We are in receipt of your letter of the seventeenth instant, addressed to the Attorney General, and accompanying your communication, and forming the basis of your inquiries, is a letter from Geo. E. Mayes, Tax Assessor of Crosby County, Texas. For a complete understanding of the inquiries, both letters are here copied and are as follows:

“Austin, Texas, March 17, 1932.

“Hon. James V. Allred, Attorney General, Austin, Texas.

“Dear sir: We are enclosing letter from George E. Mayes, Tax Assessor of Crosby County, requesting information as to assessment of certain notes and machinery.

“Your opinion is respectfully requested as to whether or not there is any method by which the assessor can enforce the assessment of the property referred to in his letter.

“Article 7183, R. C. S., 1925, provides that assessors of taxes are authorized to administer all oaths necessary to obtain a full, complete and correct assessment of all taxable property situated in their respective counties.

“Your opinion is respectfully requested as to whether or not under the provisions of this article an assessor may require an individual to answer questions under oath regarding the nature and extent of property subject to taxation.

“Article 7193, R. C. S., 1925, provides that in all cases failure to obtain a statement of all real and personal property for any cause, the assessor shall ascertain the amount and value of such property and assess same as he believes to be the true and full value thereof.

"Your opinion is respectfully requested as to whether, under the terms of this article, or any other article of the statutes, an assessor of taxes may demand access to the books and other records of an individual, co-partnership, or corporation, for the purpose of ascertaining the amount and value of property subject to taxation, but unrendered.

"Yours truly,
MOORE LYNN, State Auditor."

"GEO. E. MAYES, Tax Assessor, Crosby County.

"Crosbyton, Texas, Feb. 19, 1932.

"*Mr. Moore Lynn, Austin, Texas.*

"Dear Mr. Auditor:

"I am wondering if you can help me to in some way get renditions for taxes out of some of all of these implement companies doing business in this county.

"They get out here and through a local agency sell tractors, combines and all kinds of machinery. The party purchasing executes some kind of a contract, said contract specifically stating that the property remains the property of the company until paid for, and if the purchaser allows a payment to lapse, the companies may at once, without any sort of legal procedure, proceed to recover the aforesaid machinery. None of these implement companies render either notes or machinery for taxes. The farmers are refusing to render these unpaid machines, declaring that in many instances they have but a small equity in them. Again, these companies will make a pretense of repossessing these machines after the first of January and then refuse to render for taxes, saying they were not theirs on the first of January. If you have some suggestion or plan by which I can get these companies to render for taxes either notes or machinery, I assure you it will be greatly appreciated.

"Very truly,
GEO. E. MAYES."

In reply, we beg to advise as follows:

If the implement companies doing business in Crosby County have their domicile or principal place of business in that county, then they are liable to pay taxes in that county on all and every character of taxable property owned by them and situated in the county, the same as any other citizen.

If said companies do not have their domicile or principal place of business in that county, but are located in some other county, still such companies would be liable to pay taxes on all tangible or physical properties owned by them and situated in the county; but, in such event, that is in the event they are not domiciled in the county, any intangible property or credits, such as notes, accounts, etc., are not taxable in that county, but are taxable in the county where the company owning such has its domicile or principal place of business. Our Supreme Court has so held in the following cases:

Life Insurance Co. vs. City of Austin, 112 Tex. 1; 243 S. W. 778; Ferris vs. Kimball, 75 Tex. 476; 12 S. W. 689; Conner vs. City of Waxahachie, 22 S. W. 30.

The above cases held that the situs, for taxing purposes, of tangible property, like that mentioned above, is at the domicile of the owner.

All kinds of tangible or personal property, physical in its nature, is taxable in the county where actually situated. This is as provided by the Constitution and the statutes, and is also held by our courts in Ferris v. Kimball, and Conner v. City of Waxahachie, supra, and

in *City of Galveston v. J. M. Guffey Petroleum Company*, 113 S. W. 585.

From the foregoing you will be able to determine whether or not notes taken by machinery companies for machinery sold in that county can be assessed in that county or not. If a company owning such notes has its domicile elsewhere, it would make no difference whether such notes were actually kept by its agents in the county or not; they could only be taxed at the domicile of the owner.

As we above stated, it is different with tangible property, like machinery, cattle, or any other physical properties; such would be taxable wherever actually situated on the first day of January in any year.

This brings up another question raised by Mr. Mayes in his letter and that is, who owns the machinery referred to and in whose name or against whom should it be assessed. It is the owner of property who is required to list or render the property for taxes, Article 7158, Revised Civil Statutes, 1925.

If the assessor discovers personal property in his county which has not been rendered or assessed for taxes, he may assess the same in the name of the owner for two years back in the same manner as other property there assessed, Article 7208, Revised Civil Statutes, 1925.

If a machinery company sells a combine, or other machinery, to a purchaser in your county, and such purchase is kept in the county, then the purchaser would be the owner of such property after his purchase and required to pay taxes thereon as long as he owned the same and, for purposes of taxation, he would be, in law, the owner of such entire property, although he may owe thereon a part or all of the purchase money. He would not be permitted to render merely his equity in the machine or machinery. The law does not permit the taxpayer to offset his indebtedness against property owned by him, not even liens thereon, excepting that in case he owns credits and also owes certain character of debts, he may offset his indebtedness against credits owned by him, and he is not required to render a greater portion of his credits than he believes will be received or can be collected.

Although a machinery company, which sells a machine or machinery on credit, and in writing reserves title to such property until it is paid for, does not really own the property or title thereto, but, under the statute, only has a lien thereon. Article 5489, R. S., provides:

"All reservations of the title to or property in chattels, as security for the purchase money thereof, shall be held to be chattel mortgages," etc.

When a machinery company repossesses a piece of machinery which it has sold in payment of indebtedness against it, or to be applied as a credit on such indebtedness, from that moment it becomes the owner of such property, and if it owns same on the first day of January, it is liable for taxes thereon for that year; but if the piece of machinery continues in the hands of the purchaser as his property until after the first of January, and is then taken back by the com-

pany which sold the same, the company would not be liable for the taxes for that year, although it may have purposely delayed the repossession until after the first of January in order to avoid payment of the taxes thereon.

If the company has the legal right to take the property back, its motives for doing so would not alter the nature of the transaction. It is only in case of a colorable or simulated sale or transfer of property by the owner for the purpose of evading the payment of taxes thereon, that the assessor is authorized to inquire into the transaction and to assess the property against the real owner, disregarding the transaction, R. S., Article 7185.

The method to be pursued by the tax assessor in listing or assessing property for taxes is for the assessor to call on the owner of such property, or his agent thereunto authorized, to give a list of all the property to be assessed. In the blank list furnished the tax assessor by the Comptroller for such purposes is a schedule of all kinds of taxable property, and the assessor can take up each item of property and inquire about the same and ask particularly about property concerning which he has doubts or desires full and particular information, and he will write down on the list the property given in by the owner or agent and the value thereof, and require such list to be signed and sworn to according to the form of oath set down in Article 7161.

If the tax assessor and the person rendering the property cannot agree on the value of any item, the assessor must put down the value as stated or given in by the person rendering the same, and if the assessor is dissatisfied with this, he should note what he thinks the value is on the margin of the list and bring same to the attention of the board of equalization.

If the assessor ascertains that the owner, whose property is being listed, actually owns other property that he failed or refused to list, he may list the same himself as unrendered property, in which case the owner should have notice of such rendition and be given an opportunity to come before the board of equalization in regard to the same.

As stated above, the tax assessor may examine the taxpayer or his agent and question him closely and particularly as to the owner's property and the extent and value thereof, but we find nothing in the law which would authorize a tax assessor, in the absence of the permission or consent of the owner or agent, to go into the books, papers or records of the taxpayer.

As provided by Article 7193, Revised Civil Statutes, 1925, in all cases of failure to obtain a statement or rendition of the real and personal property of any owner, it is made the duty of the assessor to ascertain the amount and value of such property and list or assess the same at what he believes to be true and full value thereof.

In the foregoing we have not answered any questions categorically, but believe that the statements made cover all matters inquired about

and will enable you to advise Mr. Mayes as to the law relating to the matters about which he makes inquiry.

Yours very truly,

F. O. MCKINSEY,
Assistant Attorney General.

Op. No. 2892

TAXATION

Property In Interstate Commerce

1. Property moving in interstate commerce is not subject to taxation or control by the State or local authorities.
2. Property manufactured or bought for shipment in interstate commerce or which is being assembled or stored at the point of shipment is not, by reason of those facts, exempt until the shipment begins.
3. Property becomes exempt from local taxes when same actually begins to move to some point in another State or to a foreign country, or when same is delivered to a carrier to be transported to such point or points.
4. Where property has begun to move in interstate commerce a temporary delay, occasioned by the necessities, exigencies or circumstances of transportation, does not remove it from interstate commerce; otherwise, when the interruption is caused by the owner for his own convenience or for his business purposes or interest.
5. Property in interstate commerce is subject to State or local taxation when it arrives at its destination and is delivered to the consignee or owner, although still in the original package or packages; otherwise, goods imported from a foreign country are not subject to taxation by the State or local authorities until the same have been sold or have otherwise become a part of the general mass of property in the State.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, June 25 ,1932.

Mr. I. Predecki, County Auditor, Galveston, Texas.

DEAR SIR: In reply to your letter of April 6, 1932, we desire to present to you some rules which we hope will aid you in determining when property is taxable and when it cannot be taxed under the commerce clause of the Federal Constitution.

In the first place it is universally held that a State or Municipality is without authority to levy a tax upon property which is moving in interstate or foreign commerce or which is in interstate or foreign commerce.

All property which is in process of being transported from one State to another or from a State in this country to a foreign country or which is being imported from a foreign country into this country is not subject to the control of, or to be taxed by, any State or other local authority. The difficulty constantly recurs in determining when property is in interstate commerce: that is, in process of transportation and under the protection of the commerce clause. One rule is universally accepted, which is: Property is in interstate commerce from the time it is delivered to the carrier to be transported into another State, or from the time it begins to move, during all the

time it is actually moving in transportation until it reaches its destination in another State and is delivered to the consignee for use or sale. *Coe vs. Erroll*, 116 U. S. 517.

It is well settled that property is not in interstate commerce merely because it is manufactured for that purpose or is being assembled, prepared or stored for shipment and it does not take on the character of interstate or foreign commerce until it actually begins its interstate journey or is delivered to a carrier for transportation on such journey.

Another question often arises where property has begun its journey in interstate commerce and the journey is temporarily stopped and subsequently resumed and such property afterwards resumes its journey, under what circumstances the same will be subject to local taxation pending such interruption.

In the case of *Champlain Realty Company v. Brattlesboro* 260 U. S. 366, logs gathered on the West River in Vermont for a destination in New Hampshire were held not taxable in Vermont although detained there for a considerable time by a boom at Brattlesboro, to await the subsidence of highwater in the Connecticut River, the detention being only to promote the safety of the shipment, it did not break the continuity of the trip.

In the case of *T & N O Ry. Company v. Sabine Tram Company* 227 U. S. 111; *W. A. Powell Company, Ltd.*, bought and had manufactured lumber for export. Several cars of lumber were bought from the Sabine Tram Company which manufactured and shipped the same to Sabine, Texas, where it was unloaded on the wharf and in the slips to be loaded on ships to be carried thence to New York and to foreign countries. The Powell Company had sold and had orders for all of said lumber, the orders being for different grades or kinds. The Tram Company did not sort said lumber to suit each order, but loaded the same promiscuously on the cars and it was unloaded and stored on the wharf. The agent of the Powell Company classified the lumber to correspond with the orders and had the same loaded on the boats and shipped accordingly. It was contended that the shipment from the initial point to Sabine, where the lumber was unloaded and reshipped, was a local shipment and not interstate, by reason of the interruption of the journey at Sabine, as explained above. The court overruled this contention and held that from the time the shipment started, the lumber was in interstate commerce; that the interruption of the journey in order to classify and arrange the lumber was not such an interruption as to prevent the transportation from being continuous.

The case of *Carson Petroleum Company v. Leon C. Vial, Sheriff et al*, 279 U. S. 95, is an opinion, which, I think, is somewhat misunderstood, as it is in no sense different in principle from the case of *T & N O Ry. Company v. Sabine Tram Company*, *supra*. It involves shipment of oil under the circumstances and facts following: The Carson Petroleum Company bought the oil in question in the Mid-Continent Oil Field in Kansas, Oklahoma and Texas, and shipped

the same by rail in tank cars to St. Rose, La., consigned to its subsidiary. There the oil was unloaded from the tank cars into large storage tanks which had been built for that purpose. From these tanks the oil was loaded on boats for shipment to foreign ports, these boats being known as tankers. The oil was bought in the first place for this purpose and orders for the same had been received for all of the oil so shipped before it was shipped to St. Rose and the shipment from the beginning was intended for ports in foreign countries. The oil was unloaded into the storage tank because it was necessary in order to load it in the tankers. It was held in storage in said tanks for either one or two reasons, to-wit: To hold until a ship could be secured in which to load it and, in the second place, while sufficient oil was being accumulated to form a cargo. The court held that this was not such an interruption of movement of oil as to cause it to lose its foreign commerce quality, and, therefore, that same was not subject to taxation.

In the case of *General Oil Company v. Crain* 209 U. S. 211, the plaintiff in error sold and shipped into several states crude oil which it had purchased, and had manufactured and refined in Pennsylvania and Ohio. It was a Tennessee corporation, with its principal place of business in Memphis, and was engaged in the business of refining oils and selling the same in the various states of the Union, shipping the same from Pennsylvania and Ohio, (where its refineries were located), to other states in which it is sold. Numerous oil tanks of the plaintiff's were located at Memphis in which were unloaded oils shipped from plaintiff's refineries. The oil which had been sold for delivery in Arkansas, Mississippi and Louisiana was unloaded into one of said tanks kept for that purpose which was marked, "oils for Arkansas, Mississippi and Louisiana." From this tank said oil was drawn off into barrels or into other receptacles in which the same was shipped to fill the different orders from said stock. In other tanks, located in Memphis, oil was unloaded for which the company had no orders, and was held there until sold and shipped out to other states on such order.

The company contended that such oil was exempt from taxation by reason of being in interstate commerce and under the protection of the commerce clause of the Federal Constitution. The court overruled the contention and held that the oil was not in interstate commerce and used the following words:

"This certainly describes a business—describes a purpose for which the oil is taken from transportation, brought to rest in the State, and for which the protection of the State is necessary, a purpose outside of the mere transportation of the oil. The case, therefore, comes under the principle announced in *American Steel and Wire Company vs. Speed*, 192 U. S. 500."

In the case of *Bacon v. Illinois*, 227 U. S. 504, 516, oats were shipped from another state to Chicago, Ill., and there unloaded into consignee's elevator for the purpose of cleaning, clipping, weighing, classing, etc., with the intention to reship them to their original des-

mination in other states. The oats were unloaded and treated at Chicago by virtue of agreement of the shipper with the railroad at the time the oats were first shipped. After being so treated the oats were forwarded to their original destination. The court held this to be an interruption or cessation of interstate shipment whereby the oats lost their character as property in interstate commerce and that the oats were subject to taxation as local property in Chicago. The court uses this language:

“He had established a local facility in Chicago for his own benefit, and while through its employment the grain was there at rest there was no reason why it should not be included with his other property, within the State, in an assessment for taxation which was made in the usual way without discrimination.”

The following authorities are cited: *Woodruff vs. Parham*, 8 Wall. 123; *Brown vs. Houston*, 114 U. S. 622; *Coe v. Erroll*, supra; *Pittsburg Southern Coal Company vs. Bates* 156 U. S. 577; *Diamond Match Company vs. Ontonagon*, 188 U. S. 82, 93, 96; *American Steel and Wire Company vs. Speed*, 192 U. S. 500, 519; *General Oil Company vs. Crain*, 209 U. S. 211.

From the cases cited we think that the general rule for determining whether or not an interstate shipment has been interrupted so as to render the same subject to local taxation may be stated briefly as follows: If the interruption is occasioned by the exigencies, necessities and circumstances of the shipment, in order to promote the safety of the cargo, or to facilitate the same, or that is necessary, the shipment is not interrupted so as to deprive it of its interstate commerce character. But if the delay is unnecessary and not occasioned by circumstances attending its transportation, but for the convenience or at the will of, or to promote or serve the business interest of the shipper in any way, then such shipment ceases to be moving in interstate commerce and is subject to local taxation.

There is a difference as to the power of the State to tax property in foreign commerce and interstate commerce. This is by reason of the difference between the provisions of the Federal Constitution relating to such subjects. As to both interstate and foreign commerce the provision is that Congress shall have the power to regulate the same. As to foreign commerce it is further provided, “No State shall without the consent of the Congress lay any imposts or duties on imports and exports etc.”

It is uniformly held that to levy a tax on imported goods before same has become a part of the general mass of property of the State is to “lay imposts or duties” thereon, in violation of the above provisions, it being held that imports and exports relate solely to articles of foreign commerce. *American Steel and Wire Company v. Speed*, supra, and cases cited there.

That case also holds that there is no difference as to the point at which foreign and interstate commerce ends. In either case an article continues either in foreign or interstate commerce until it arrives at its destination and is delivered to the owner or consignee, and then

continues so long as the same remains unsold in the hands of the importer in the original package; but after the point of time at which an article is delivered to the importer or consignee, in the case of interstate commerce such article is subject to be taxed by the State or local authorities, even though it remain in the original package unopened. *American Steel and Wire Company v. Speed*, supra; *Brown v. Maryland* 12 Wheat. 419.

The above cases hold that imported goods or property are not subject to taxation by the State or local authorities at any point before same have become a part of the general mass of the property of the State; that is, at any time before same have been removed from the original packages or have been sold and commingled.

From the authorities cited and others which have been studied the following rules relating to this subject maybe derived and stated.

1. No property is in interstate commerce until it has actually begun its journey or is moving in its journey to another state, or to a foreign country, or has been delivered to a carrier for transportation to such points.

2. If a shipment becomes interstate or foreign commerce, temporary delay enroute, by reason of the necessities or exigencies of the transportation, does not change its character but it is still considered to be in process of transportation.

3. The manufacture or purchase of commodities for interstate commerce or the assembling and storage in warehouses or other storage places, of cotton, oil or other commodities, with a view to shipment to other states or foreign countries, does not protect them from local taxes, and they are not exempt from local taxation until they have actually begun their journey, or have been delivered to a carrier for shipment to a point beyond the State.

4. Where cotton or oil are shipped to a point even with the intention subsequently at some time to be trans-shipped to a point outside of the State, and are held for an indefinite length of time, the time of trans-shipment depending upon the will of the owner, or on future sales or orders, the property would be subject to local taxation. In order to be protected under the commerce clause, the movement must be continuous, or the suspension only temporary, and required by the exigencies or circumstances of transportation.

5. If property is for shipment or in process of shipment from one point in the State to another point in the same state, as its final destination, it is subject to local control and taxation.

6. Where a company which owns a refinery in another state buys crude oil for such refinery and also for sale in, and shipment to, foreign markets, and transports such oil to some port convenient for shipment by water and gathers large quantities intending to sell some undetermined portion in foreign markets and to be transported thence, and the balance to be shipped to its refinery, such oil is subject to local taxation.

7. Determined by the amount sold, all said oil so stored at the seaside. would be subject to taxation, because none of it had started

on a definite journey to any particular place outside the State. In that case the initial shipment would be definitely interrupted, in that the oil is delivered to the owner and is under his absolute domination and control.

Yours very truly,
 F. O. MCKINSEY,
 Assistant Attorney General.

Op. No. 2895

TAXATION—TAXATION OF PROPERTY OF NATIONAL BANKS
 CONTROLLED BY CONGRESS

1. Congress alone has authority to permit property of national banks to be taxed.
2. States' power to tax the stock or property of national banks is purely permissive.
3. Congress has authorized the State to tax only the stock and real estate of national banks. The State is without authority to tax directly personal property belonging to a national bank.
4. The county tax collector and the Commissioners' Court of Burnet County are without authority to assess for taxation live stock which belongs to the Lampasas National Bank, although the same is situated in Burnet County.
5. The provisions of our State Constitution relating to taxation must yield to the Acts of Congress providing the method and extent of taxing property of national banks.

OFFICES OF THE ATTORNEY GENERAL,
 AUSTIN, TEXAS, July 21, 1932.

Mr. J. J. Byrne, County Attorney, Lampasas County, Lampasas, Texas.

DEAR SIR: Your communication of the ninth instant, addressed to the Attorney General, is as follows:

"On October 6, 1931, the Peoples National Bank of Lampasas became the owner of certain live stock located in Burnet County, taking the same over in settlement of notes due it by the owner of the live stock. The bank continued to own the stock and owns it at this time. The Commissioners' Court of Burnet County has demanded that the bank render these live stock for taxation in Burnet County for the year 1932. The bank renders for taxation in Lampasas County its real estate and also its capital stock, the value of which is based upon all of its assets, excluding the real estate."

You ask if the Commissioners' Court of Burnet County has the authority to compel said livestock to be rendered for taxes or require same to be assessed for taxes in Burnet County.

We reply that Article 7166, Revised Civil Statutes, 1925, provides the manner and method of assessing for taxes property belonging to national banks. It is there provided in substance that the bank shall render its real estate to the assessor of the county in which it is located at the time, and in the manner required of individuals; and further that some officer of the bank, at the time of rendering its real estate, shall file with the assessor of the county where the

bank is located a sworn statement showing the number and amount of the shares of said bank, the name and residence of each shareholder and the number and amount of shares owned by each.

It is further provided that each shareholder of said bank shall render, in the city or town where the bank is located, at its actual value, each share owned by him in such bank, less the proportional part of the total value of the assets of such bank as is represented by real estate listed in its separate rendition.

If this law is valid, then an assessment or rendition of the capital stock of a national bank would include all its personal property of every description, and the taxation of any of the bank's personal property, in addition to the taxation of its stock at its actual value, would be double taxation.

It is true that Article 8, Section 11 of our State Constitution, provides as follows:

"All property, whether owned by persons or corporations, shall be assessed for taxation and the taxes paid in the county where situated."

From this it would follow that if taxation of the property of national banks were governed by State law, said Article 7166 would be invalid insofar as it provides for the assessment and payment of taxes on personal property in any county other than that in which such property is situated.

However, such is not the case. The Acts of Congress govern in such matters, and the only authority which any State has to tax the stock or property of a national bank is purely permissive; that is, such authority as is granted to the State by Acts of the Congress of the United States. This is recognized to be the law by the courts of our State. *Prim v. Fort*, 57 S. W. 86; *City of Marshall v. State Bank of Marshall*, 127 S. W. 1083; S. C. on rehearing 127 S. W. 972.

The Congress of the United States has granted to the states the right to tax the property of national banks, and has prescribed the manner and method of taxing same. This is done by Section 548, 12 U. S. C. A. pages 366 and 367 and, so far as material here, the language of such enactment is as follows:

"The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may tax said shares, or include dividends derived therefrom in the taxable income of an owner or holder thereof, or tax the income of such association, provided the following conditions are complied with:

"1. (a) The imposition by said State of any one of the above three forms of taxation shall be in lieu of the other. * * *

"3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed."

It will be observed that our Legislature, in providing for the taxation of property belonging to national banks, made the provisions thereof correspond with the authority granted by said Act of Congress.

In support of the law, as above cited, to the effect that the power of a state to tax national banks is permissive and is derived entirely from the Act of Congress, I will refer to the following authorities:

National banks are subject to state taxation only as Congress expressly permits. *Swords vs. Nutt*, 11 F. Rep. (2) 936 (1, 2); *Des Moines Bank vs. Fairweather*, 263 U. S. 1031; *Owensboro National Bank vs. Owensboro*, 173 U. S. 664, 43 L. Ed. 850.

The respective states would be wholly without power to levy any tax, either direct or indirect, upon the national banks, their property, assets or franchises, were it not for permissive legislation by Congress. *Citizens Saving Bank vs. Owensboro*, 173 U. S. 636, 43 L. Ed. 840; *Talbott vs. Silver Bow County*, 139 U. S. 438, 35 L. Ed. 210, and numerous other cases that could be cited.

Shares of national bank can be taxed by states only in the manner and to the extent authorized by Act of Congress. *State vs. First National Bank (Minn.)* 204 N. W. 874, 205 N. W. 375.

"It is settled that the relation of the national banks to the United States, and the purposes intended to be subserved by their creation are such that there can be no taxation, by or under state authority, of the banks their property or shares of their capital stock otherwise than in conformity with the terms and restrictions embodied in the assets given by Congress to such taxation." *People vs. Weaver*, 100 U. S. 543, *Owensboro*, supra; *First National Bank of Gulf Port vs. Adams*, 258 U. S. 362, 66 L. Ed. 661; *Des Moines National Bank vs. Fairweather*, supra.

The full measure of the power of the State to impose taxes on such associations or their stockholders is prescribed by this section and any assessment not in conformity therewith is unauthorized and invalid. *Owensboro National Bank vs. Owensboro*, supra; *First National Bank vs. Adams*, supra; *People ex rel. Hanover Bank vs. Goldfogle*, 234 N. Y. 345, 137 N. E. 611, S. C. 261 U. S. 620, 67 L. Ed. 830.

The only taxation of national banks contemplated by this section (Sec. 548, supra, United States Statute) is taxation of shares of stock and real estate. *First National Bank vs. Albright*, 208 U. S. 548, 52 L. Ed. 614; *Bank of California, etc. vs. Richardson*, 248 U. S. 476, 63 L. Ed. 372.

"This section * * * is the measure of the power of a state to tax national banks, their property or their franchises. By its unambiguous provisions the power is confined to a taxation of the shares of stock in the names of the shareholders and to an assessment of the real estate of the bank. Any tax, therefore, which is in excess of, and not in conformity to, these requirements, is void." *Owensboro National Bank vs. Owensboro*, supra; *San Francisco First National Bank vs. San Francisco (Calif.)* 61 P. 778; *Weiser National Bank vs. Jeffreys (Idaho)*, 95 p. 23; *Smith vs. Tecumseh First National Bank*, 17 Mich. 479; *Dennis vs. First National Bank (Mont.)*, 178 p. 580; *Stillman vs. Lynch (Utah)*, 192 p. 272.

The effect of the above section of the United States Revised Statutes is to except personal property belonging to national banks from direct assessment; that is, the personal property of such banks cannot be directly assessed to them by the State for purposes of taxation. *Rosenblatt vs. Johnson*, 104 U. S. 463, 26 L. Ed. 832; *San Francisco vs. Crocker-Woolworth National Bank*, 92 F. 273.

National Banks are not merely private moneyed institutions, but agencies of the United States, created under its laws to promote its fiscal policies, and hence the banks, their property, and their shares cannot be taxed under state authority, except as Congress consents, and then only in conformity with restrictions. *First National Bank vs. Anderson*, 269 U. S. 341, 70 L. Ed. 295.

Article 6 of the Constitution of the United States is, in part, as follows:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made or which shall be made

under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, nothing in the Constitution or laws of any State to the contrary notwithstanding."

The creation of national banks and the regulation of same and the manner of taxing such banks, their assets and their shares of stock are clearly under the control and jurisdiction of Congress. The Acts of Congress, in relation to such matter, are the Supreme law of the land. The State has no power or privilege to run counter thereto either by statutory or constitutional provisions. Hence, the only power or authority which the State has to assess property of a national bank is to assess the real estate and the shares of stock of said bank in accordance with the permission given by Congress, which is reflected in our 1925 Revised Civil Statutes, Article 7166. No permission or privilege is granted to the State to tax directly the live stock, or any other species of personal property, belonging to a national bank.

The Commissioners' Court of Burnet County has no authority to assess for taxes any live stock belonging to the Peoples National Bank of Lampasas, although such live stock is situated in Burnet County.

Yours very truly,

F. O. MCKINSEY,

Assistant Attorney General.

Op. No. 2896

TAXATION

1. The club building located in Austin and belonging to the Texas Federation of Women's Clubs is not within any class of property exempt from taxation, and is therefore not exempt from taxation.

2. The Constitution itself does not exempt property from taxation, but merely authorized the Legislature to exempt from taxation the property named in the Constitution.

3. Although property is named or described in the Constitution which the Legislature is thereby authorized to exempt, the same does not become exempt until and unless the Legislature by general law has exempted same.

OFFICES OF THE ATTORNEY GENERAL,

AUSTIN, TEXAS, September 26, 1932.

Honorable James V. Allred, Attorney General, Austin, Texas.

DEAR SIR: The Federation of Women's Clubs is incorporated under the laws of the State of Texas without capital stock. The object of the corporation, according to its Articles of Incorporation, are, "to advance and encourage Texas women in culture and education, to promote and encourage fraternal intercourse among women's clubs, not having a propaganda within and without the State, and to secure all benefits resulting from this organized effort." The organization has a state president and other state officers, and its business is transacted by an executive board consisting of its state offi-

cers and three other appointed members. The domicile and principal office of the Federation is in the City of Austin, although its business may be transacted in any county in this state that may be designated by its president or executive board.

The corporation, which is hereinafter for convenience, referred to as Federation, owns a club building in the city of Austin which is now nearing completion and which has been built by private donations and contributions made by its members scattered over the state, and partly from borrowed funds.

When completed, it is expected that said building will house the offices of the Federation, a library, an art gallery, and contain an auditorium for its public meetings, and also for use by other organizations for which the Federation expects to receive compensation. The building also contains a number of bed rooms furnished and supplied for the use of visiting officers and members. The activities of the Federation will be conducted from said building, and all of its state meetings and committee meetings are expected to be held there, accommodations for same having been made in the building.

The only resources of the Federation consist of the dues paid by the members of affiliated clubs, and donations for the building fund. Whatever revenue may be derived from the use of any part of the building when completed, as well as all gifts received, will be devoted to paying for the lot and building and for its care, maintenance and upkeep. All moneys received as dues are expended exclusively for carrying on the work of the club, no part of same being spent for any other purpose.

The Federation has nine departments of work, designated Americanization, the American Home, Education, Fine Arts, International Relations, Press and Publicity, Legislation, Public Welfare, and Juniors. Work in the departments just named embraces schools for foreigners in which are taught elementary subjects and, along with this, love and loyalty of country and flag; cooperation with the A. & M. College Extension Service Department helping to improve and elevate the standards of the rural home; hundreds of scholarships for girls and boys in this state are sponsored; many libraries throughout the State are established and maintained, cooperating with the State Department of Health in promoting the health of the people and lending assistance to child welfare programs; continued effort of self-culture among its members to attain the highest standard along that line. It uses all funds received for maintenance and progress and not for profit sharing.

Based on the foregoing outline of the nature and activities of the Federation, you desire to know if its property, which consists of said club building furnishings and equipment when completed, is or will be exempt from taxation.

Be it remembered that the Constitution does not exempt any property from taxation. In Sec. 2 of Article VIII in express terms, the Constitution authorizes the Legislature, by general laws, to exempt:

from taxation certain property sought to be defined and described in said Section. It must further be borne in mind that the Legislature is without authority to exempt any property from taxation except such as the Constitution has plainly authorized it to exempt; for said Sec. 2 closes with the following provision

“And all laws exempting property from taxation other than the property above mentioned shall be null and void.”

In order to answer your inquiry, it will be necessary in the first place to consider and construe the Section of the Constitution above referred to, so that we may determine whether or not the Constitution authorizes the Legislature to exempt said property of the Federation; and if the Legislature has been so authorized, then to determine whether or not said property has been included or embraced in the properties which the Legislature has exempted. You will note that two things must occur in order for property to become exempt from taxation; first, the Constitution must authorize the Legislature by general law to exempt the same; and, second, acting upon this mandate or authority, the Legislature must pass a law exempting said property.

Sec. 2 of Article VIII of the Constitution, as amended in 1928, contains the authority under which the Legislature must act in exempting any property from taxation. The provisions of said sections, insofar as they are material to the consideration of the question involved, are as follows:

- “. . . but the Legislature may, by general laws, exempt from taxation:
- (a) public property used for public purposes;
 - (b) actual places of religious worship;
 - (c) also any property owned by a church or by a strictly religious society for the exclusive use as a dwelling place for the minister of such church or religious society. . . . ;”
 - (d) places of burial not held for private or corporate profit;
 - (e) all buildings used exclusively and owned by persons or associations of persons for school purposes; and the necessary furniture of all schools;
 - (f) and property used exclusively and reasonably necessary in conducting any association engaged in promoting the religious, educational, and physical development of boys, girls, young men, and young women operating under a state or national organization of like character;
 - (g) also the endowment funds of such institutions of learning and religion not used with a view of profit;
 - (h) and institutions of purely public charity; . . . ”

Subdivisions (f) and (g) set out above were added by amendment in 1928, which seem to be the only changes made. The one was added for the purpose of enabling the Legislature to exempt parsonages, and the other to enable it to exempt Young Men's and Young Women's Christian Associations. The Legislature had, by an act approved March 31, 1913, sought to exempt from taxation the property of Young Men's and Young Women's Christian Associations, but the Courts had held the act invalid on the ground that the Constitution did not authorize it to exempt such property. The same had been the holding of the Court with reference to church

parsonages, and the purpose of said amendment seems to have been to authorize the exemption of such properties.

It may be well enough to note some general rules laid down for use in construing tax exemption laws.

"Burden is on the person claiming exemption from taxation to clearly prove it. . . . Exemptions from taxation are not favored, and the law allowing them should be given strict interpretation." *Benevolent and Protective Order of the Elks vs. City of Houston*, 44 S. W. (2) 488.

"Exemptions from taxation are in derogation not only of sovereign authority, but of common rights. . . . Exemptions from taxation must be strictly construed both as to the meaning of the statutes granting, and as to the power of the Legislature to enact, them." *Jones vs. Williams* (Texas Sup.), 44 S. W. (2) 130.

"Exemptions from taxation are never favored and, in construing laws exempting any citizen or class of property, all doubts are resolved against the exemption." *Santa Rosa Infirmary vs. City of San Antonio* (Comm. App.), 259 S. W. 926.

Applying such rules, in order for property to be held exempt from taxation, the Constitution in plain language must authorize the Legislature to pass a law exempting such property, and then the Legislature must enact a law by the plain terms and provisions of which the property is exempt.

In the case of *City of San Antonio vs. Y. M. C. A.*, 285 S. W. 844, it was sought to uphold an act of the Legislature purporting to exempt from taxation the property of said Association under three different provisions of the Constitution. The first was that the law was authorized by the provision of the Constitution: "all buildings used exclusively and owned by persons or associations for school purposes"; second, "actual places of religious worship"; and third, "institutions of purely public charity." These contentions were all rejected, the Court holding that neither the purpose nor activities of the Association place it in either class, and that therefore the Legislature had no authority to exempt its property from taxation.

We submit that it will not be contended that the Federation is an institution of purely public charity. It may be contended, however, that the provision quoted above, "all buildings used exclusively and owned by persons or associations of persons for school purposes" affords sufficient authority for the Legislature to exempt the property of the Federation. It will be noted, however, that in order to exempt such property, the buildings must be used exclusively and owned by a person or associations of persons for school purposes; that is, they must be used exclusively for school purposes.

In the case of *Reed vs. Johnson*, 33 Tex. 284, the facts were that the father and mother owned the property in question and conducted a school thereon, an academy for young ladies. They had children, and the family used a portion of the building for purposes of a family home. The courts held that the property was not used exclusively for school purposes, and therefore was not exempt. Later the father and mother died and their daughters inherited the school property and continued to conduct the school in the build-

ing, as their father and mother had done before. They were spinsters and lived in rooms in the building while school was going on, but the evidence shows that this was necessary for the proper conduct and discipline of the school. During vacation, two of the daughters lived in the building, but it is shown that that was necessary for the proper protection and repair of the property, and to attend to correspondence with their patrons. The court held that the property was used exclusively for school purposes, and was therefore exempt.

Besides, the idea of a school carries with it and involves the conception of a building, school equipment and furniture, classes, lessons, pupils, grounds, and appurtenances suitable and sufficient for conducting and operating an actual school. This, it seems, is on the premises, what is involved in the idea and conception of a school, and must have been what the framers of our Constitution had in mind when they formulated the provision relating to the exemption of school property. According to common conception the terms "school property" and "club property" have distinct meanings.

Whether the other provision in Sec. 2 of Article VIII of the Constitution, which is intended to cover property of Young Men's and Young Women's Christian Associations, is applicable to the property of the Federation, it is unnecessary to determine. Even conceding that under the authority of that provision the Legislature would be authorized to exempt the building of the Federation from taxes, it has never exercised the authority, that is, since that amendment was adopted, it has passed no exemption law which would include the club building of the Federation.

This may be verified by reference to Ch. 124, p. 211, General Laws of the Forty-second Legislature, Regular Session. In that act, Sec. 1 of Article 7150 was amended, and the only provisions that could be deemed applicable to the property under consideration are the following:

"Public school houses and actual places of religious worship. . . ."

"All public colleges, public academies, and all endowment funds of institutions of learning and religion not used with a view to profit, and when the same are invested in bonds or mortgages, and all such buildings used exclusively and owned by persons or associations of persons for school purposes."

This is absolutely all that could include the Federation Club building.

The provision beginning "all such buildings used exclusively . . ." that being copied almost literally from the Constitution has been discussed. It will be noted, however, that the legislative enactment is qualified in some small way, and is not quite so broad as the provision of the Constitution in that the former uses the phrase, "all such buildings." That language indicates that it refers to some building which had already been named, and the only buildings

named above in the act are public school houses, all public colleges, and public academies.

The language of the Constitution is a little broader in that it is "all buildings used exclusively," etc., and not "all such buildings," and therefore is not restricted to any buildings that have been theretofore named therein.

It is our opinion that our present statutes do not exempt from taxation the club building of the State Federation of Women's Clubs.

Yours very respectfully,

F. O. MCKINSEY,
Assistant Attorney General.

Op. No. 2902.

TAXATION—INCOME TAX—CONSTITUTIONALITY—GRADUATED RATES—
RATES, INDIVIDUALS AND CORPORATIONS—EXEMPTIONS—
STATUTES—RETROSPECTIVE EFFECT.

1. Legislature has inherent power to impose income tax, unless prohibited by the Constitution; this power expressly recognized by Article 8, Section 1, Constitution.

2. Income tax is not "tax on property" within the meaning of the requirement that same must be levied ad valorem.

3. Legislature has power to classify subjects of taxation, other than property, provided classification made is reasonable and not arbitrary.

4. Classification of subjects or taxation is a legislative function, and will not be disturbed by the courts unless the classification is purely arbitrary.

5. Legislature may classify subjects of income taxation according to ability to pay, provided classifications so made are reasonable and not arbitrary.

6. Legislature, in classification of income for purpose of taxation, may levy graduated rates, provided the rate is uniform upon each member of a particular class.

7. Legislature in imposing income tax, may allow reasonable exemptions.

8. An income tax statute would not be unconstitutional because it imposes a different rate upon the income of corporations from that imposed on income of individuals.

9. Income tax statute levying a tax on the entire income for the year in which same was passed and therefore taxing that portion of income accrued prior to passage of statute would not be retrospective in such sense as to render it unconstitutional so far as the year in which it is passed is concerned.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, October 17, 1932.

*Senator Ben G. Oneal, Chairman Legislature Tax Survey Committee,
Austin, Texas.*

GENTLEMEN: We are in receipt of copy of tentative draft of the proposed income tax law submitted in connection with your communication addressed to this department, in which you request to be advised upon the following questions, to-wit:

1. Has the Legislature of Texas, under present constitutional provisions, the authority to levy an income tax carrying graduated rates?
2. Can the income of corporations be taxed at a different rate from that of income of individuals?
3. May the Legislature constitutionally provide certain exemptions of income from taxation?
4. Can the Legislature, in session in 1933, levy a tax on the entire net income for 1933, including that portion of the year prior to the date when the law becomes effective?

In replying to the above, we will consider the questions presented in the numerical order in which they appear.

1.

It is an elementary rule that the Legislature can enact all laws not prohibited, either in express terms or by necessary implication, by either the State or Federal constitution. *Cooley, Constitutional Limitations*, (8th ed.) Vol. 1, 345, 355; 9 *Tex. Juris.* 444, 446, sections 30-32.

It is also fundamental that the validity of a statute is presumed until it is shown to be clearly unconstitutional, and that all doubts as to its constitutionality will be resolved in favor of its validity. *Smith vs. Patterson*, 232 S. W. 749.

It is further elementary that it is within the power of the Legislature to levy any tax upon any subject of taxation within the State, unless it is prohibited from so doing by constitutional restriction. *Norris vs. City of Waco*, 57 *Tex.* 635, 640; *State vs. H. & T. C. Ry. Co.*, (Civ. App.) 209 S. W. 820, 822.

"Everything to which the legislative power extends, may be the subject of taxation, whether it be person or property, or possession, franchise or privilege, or occupation or right. Nothing but express constitutional limitation upon legislative authority can exclude anything to which the authority extends from the grasp of the taxing power, if the legislature in its discretion shall at any time select it for revenue purposes." *Cooley on Taxation*, (4th Ed.) Vol. I, Sec. 71, p. 177.

The rule is stated in 26 R. C. L. Sec. 12, at page 26:

"The power of taxation is inherent in a sovereign state. The right to tax is not granted by the constitution but of necessity underlies it, because government could not exist or perform its functions without it. While it may be regulated and limited by the constitution, it exists without express authority in the fundamental law as a necessary attribute of sovereignty. The provisions of the constitution which relate to the power of taxation do not operate as grants of the power of taxation to the government thus set up, but constitute limitations upon a power which would otherwise be without limit."

Therefore the Legislature, unless prohibited by the Constitution, has the power to impose an income tax. *Glasgow vs. Rowse*, 43 *Mo.* 479, 491; *State vs. Pinder*, 7 *Boyce* (Del.) 416, 108 *Atl.* 43; *Featherstone vs. Norman*, 170 *Ga.* 370, 153 *S. E.* 58, 70 *A. L. R.* 449.

Whether the Legislature has the inherent power to tax incomes is purely academic in Texas, because to do so is expressly recognized by Article 8, Section 1 of the Constitution of this State. However, the inquiry whether the legislature may levy a graduated income tax,

raises the question whether a tax on income is a tax upon property within the meaning of the word "property" as used in Section 1, Article 8 of our Constitution, and must, therefore, be laid in proportion to value. In consideration of that question, we must consider the nature of an income tax.

Cooley defines "income tax" as "one which relates to the product or income from property, or from business pursuits," but states that "taxable income may result from other sources." 4 Cooley, Taxation, (4th ed.) Sec. 1741.

Even in the absence of express constitutional recognition of authority of the Legislature to levy income taxes, it is a conclusion supported by the weight of authority that a tax upon income is not a tax upon property, or at least is not such a tax as to be included in the constitutional limitations imposed on property taxes; but in some cases, either because of the peculiar wording of constitutional provisions or otherwise, the contrary has been held. 4 Cooley, Taxation, (4th ed.) Secs. 1743 and 1751; Black, Income and Other Federal Taxes, (3rd ed) Sec. 44; 31 Corpus Juris, 397 (Sec. 2-B); State vs. Tax Commission, 161 Wis. 111, 152 N. W. 848; Featherstone vs. Norman, *supra*, and cases cited.

The Constitution of this State, in Section 1, Article 8, expressly declares that "all property in this State, whether owned by natural persons or corporations, shall be taxed in proportion to its value" (evidently alluding to ad valorem taxes); the following provisions of the section declare that "the Legislature may impose a poll tax," and "it may also impose occupation taxes," and that "it may also tax incomes."

The Constitution having expressly recognized the power of the Legislature to impose occupation taxes, upon both natural persons and corporations doing business in this state, and placing no limitation whatever upon the power, except that no occupation tax shall be levied upon pursuits, agricultural or mechanical, and save that contained in Section 2 of Article 8, requiring that all occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax, it is well settled in this state that occupation taxes are not taxes on property within the meaning of that word as used in the constitutional limitation that property shall be taxed in proportion to its value, although the tax may be levied upon the value, extent or magnitude of business done. Napier vs. Hodges, 31 Tex. 287; Albrecht vs. State, 8 Tex. App. 216, 34 Am. R. 737, 742; Pullman Palace Car Co. vs. State, 64 Tex. 274, 275; Texas Co. vs. Stephens, 100 Tex. 628, 103 S. W. 484; Producers Oil Co. vs. Stephens, (Civ. A.) 99 S. W. 157; (Writ of error refused); M. K. & T. Ry. Co. vs. Shannon, 100 Tex. 379, 100 S. W. 138, 144; State vs. Stephens, 4 Texas 137.

It is submitted that the same is true with reference to an income tax, and that an income tax is not a tax on property within the meaning of the constitutional requirement that property shall be taxed in proportion to its value because the Constitution expressly recog-

nizes taxation of property and taxation of incomes as two separate and distinct methods of taxation. Art. 8, Sec. 1, *supra*.

This point was expressly decided in the State of Wisconsin, where the constitutional limitations upon the legislative power to tax property are very similar to those of our Constitution, and where the constitution expressly recognizes the power of the legislature to tax incomes. *State vs. Frear*, 148 Wis. 456, 134 N. W. 673, 135 N. W. 164, L. R. A. 1915B 569, 606.

It is therefore our opinion that an income tax is not a tax on property, within our constitutional requirement that taxation of property shall be in proportion to its value, and that the legislature in levying an income tax is not required to levy same in proportion to the property value of the income taxed.

The Constitution of this State requires that "Taxation shall be equal and uniform," and it is well settled in the decisions of the courts of this State that all character of taxes fall within this limitation. *Taylor vs. Boyd*, 63 Tex. 533; *State vs. Stephens*, 4 Tex. 137; *Napier vs. Hodges*, *supra*; *M. K. & T. Ry. Co. vs. Shannon*, *supra*; *Texas Banking & Ins. Co. vs. State*, 42 Tex. 636, 639.

It must be conceded, therefore, that if the Legislature has the power to levy a graduated income tax, the same must be in compliance with the requirement of the Constitution that taxation shall be equal and uniform.

The Legislature has full power with reference to taxation, except as limited:

- (1) By express provisions of the Federal or State Constitution;
- (2) By limitation created by contract;
- (3) By inherent limitations:
 - (a) on the power to tax for private purposes,
 - (b) on the power of state government to tax federal agencies, and on the power of the federal government to tax state agencies, and
 - (c) on the power to tax property outside of the territorial limits of the government levying the tax. *Cooley, Taxation* (4th ed.) Secs. 59, 86.

Since the inherent limitations on the power of the Legislature in regard to taxation are universally recognized, and must be observed with reference to the imposition of all taxes, and since no question concerning limitations created by contract has been presented, we will, in order to more briefly consider the subject of our inquiry, pretermit any consideration of those questions in this opinion, and will confine our discussion to consideration of the express constitutional limitations on the taxing power of the Legislature.

The constitutional restrictions that all property in this State, whether owned by natural persons or by corporations, other than municipal, shall be taxed in proportion to its value, and that taxation shall be equal and uniform, place property in one class, and there can be levied but one rate upon all species of it. *Lively vs. M. K. & T. Ry. Co.*, 102 Tex. 545, 120 S. W. 852, 121 S. W. 1149; *Norris vs. City of Waco*, *supra*; *Pullman P. C. Co. vs. State*, *supra*; *Featherstone vs. Norman*, *supra*.

The makers of the Constitution, having placed property in one class for purposes of ad valorem taxation, and also having expressly

recognized the power of the Legislature to impose an income tax, and having placed no limitation upon the power to do so, other than to require that such tax be equal and uniform, the Legislature has ample authority to impose an income tax, subject to the limitation that same be equal and uniform.

In the absence of constitutional restriction, the Legislature would have the inherent power to classify, as it saw fit, the subjects of taxation for the purpose of imposing an income tax. Since the only limitation placed by our Constitution upon this inherent power of the Legislature (excepting limitations on property taxation) is that taxation shall be equal and uniform, it is only necessary for us to consider the extent to which this limitation curtails the power of the Legislature to classify the subjects of taxation, other than property.

Since the Constitution has laid down no rule by which the uniformity and equality it requires is to be secured, it is the duty of the Legislature to ascertain and determine how it may best be accomplished. *Texas Banking & Ins. Co. vs. State*, supra. In this regard, the courts of this state have held that it is "within the undoubted powers of the Legislature to make reasonable classifications of the subjects of taxation," other than property. *Stuard vs. Thompson*, (Civ. App.) 251 S. W. 277, 281; *Solon vs. State*, 54 Tex. Cr. R. 261, 114 S. W. 349; *Gulf States Utilities Co. vs. State*, 46 S. W. (2d) 1018, 1027 (Civ. App, error refused); *Dallas Gas Co., vs State*, 261 S. W. 1063 (Civ. App. error refused).

With reference to the power of the Legislature to make classifications of the subjects of taxation other than property, where the Constitution requires taxation to be equal and uniform, the Texas cases in which the validity of statutes imposing occupation taxes was involved, under the provisions of the Constitutions of this State from 1845-1876, are peculiarly applicable. The history of this litigation is briefly presented by the court in *Dallas Gas Co. vs State*, supra, at pp. 1066-1067:

"The first decision on the question of occupation taxes we find in this state was rendered by the Supreme Court of Texas, in 1846 (see *Aulanier vs. Governor*, 1 Tex. 653), in which the constitutionality of a liquor license was assailed. That was under the Constitution of 1845. In that Constitution (Article 7, Sec. 27) the following provision on the subject of taxation occurs:

"Taxation shall be equal and uniform throughout the state. All property in this state shall be taxed in proportion to its value, to be ascertained as directed by law; except such property as two-thirds of both houses of the Legislature may think proper to exempt from taxation. The Legislature shall have power to lay an income tax, and to tax all persons pursuing any occupation, trade, or profession; provided that the term "occupation" shall not be construed to apply to pursuits either agricultural or mechanical.'

"This provision of the Constitution was carried forward in haec verba in the Constitutions of 1861, 1866, and 1869. *It will be noticed that this language does not expressly authorize the Legislature to classify occupations for purposes of taxation.*— In 1871 the Legislature levied and provided for collection of an occupation tax in various amounts on numerous occupations, including the following:

"From every person or firm dealing in stocks or bills of exchange in any city or towns exceeding 5,000 in population, an annual tax of \$250.00;

and from any such person or firm in any city or town of less than 5,000 inhabitants, an annual tax of \$50.00.' Acts of 1871, Chap. 52, Sec. 6.

"This act was attacked as violative of the provision of the Constitution of 1869 that 'taxation shall be equal and uniform throughout the state'. In an opinion rendered in 1875, shortly before the convention which framed our present Constitution met, our Supreme Court, speaking through Mr. Justice Moore, laid down the following:

"The particular question for our determination in this case is, whether the law levying the occupation tax for which this suit is brought violates the constitutional requirement of equality, in a tax levied upon persons pursuing any occupation, trade or profession. What rule of practice can be found which is strictly applicable to such a tax? Surely it is not that of a definite sum to be paid by every one upon whom it is levied. Scarcely one could be devised more unequal or less uniform for the just and fair apportionment of its burden among those upon whom it is imposed. The tax thus levied which would be ruinous upon one occupation, would be the merest trifle upon another. The same might also be the result if no discrimination could be made between parties engaged in the same general class of occupation. A just and reasonable discrimination in the levy would seem to approach nearer an uniform and equal apportionment of the burden of the tax among those upon whom it is levied than any other. As the Constitution has laid down no rule by which the uniformity and equality it requires is to be secured, it is the duty of the legislature to ascertain and determine how it may best be accomplished.

"It has not been made to appear to the court, that it has failed to do so by the law levying occupation taxes. Unless it had, we cannot say the law is in violation of the Constitution. It conforms, with but slight and not very material deviations, to long and uniform usage in the levy of taxes of this character, under our former Constitutions, containing the same restrictions as these which it is supposed to violate. And it is but reasonable to suppose, that these provisions were retained in the present Constitution in view of their receiving the same practical construction as had been previously given them.' Texas Banking & Insurance Co. vs. State, 42 Tex. 640.

"In another opinion on this subject at the same term of that court, by the same justice, the court used the following clear and concise language:

"Equality and uniformity of taxes on occupations, to the approximate extent of which it is reasonably attainable, is required by the Constitution, and is an essential element in the power of taxation. But discrimination in occupation and classifications of them, so far as it has been made to appear to us, seems to be a reasonable and proper rule applied by the Legislature for the purpose of apportioning such taxes with equality and uniformity. Until it is shown that the Legislature has clearly exceeded the limit of their authority and disregarded the restrictions by which it should be controlled, evidently the court cannot interfere.' Blessing vs. City of Galveston, 42 Tex. 660.

"The appellant has set out in its brief an interesting article published by the Galveston News, in 1875, written by the attorney for the appellant in the Texas Banking & Insurance Co. case, while the constitutional convention was in session, discussing at length the Supreme Court's opinion in that case and appealing to the convention to amend the Constitution so as to prevent in the future any such classification of occupations for purposes of taxation. While interesting, the article is clearly biased, and if it influenced the convention at all, the result was, as shown by Sections 1 and 2 of Article 8 of the present Constitution, to extend the scope of occupation taxes, and to recognize the power of the State, and that of the county, city, and town to classify occupations for that purpose.

"Classifications of occupations for purposes of taxation has been repeatedly recognized under our present state Constitution and under the Constitution of the United States as strictly a legislative function. * * *"
(Italics are the writers')

While it is to be observed that the Legislature is not expressly au-

thorized to classify the subjects of taxation for the purpose of imposing an income tax, yet it must further be observed that before 1876, the same was true of all taxes other than those upon property, (Article VII, Section 27, Constitution of Texas, 1845; *Ibid.*, Constitution, 1866, Article XII, Section 19, Constitution, 1868;) while the framers of the Constitution of 1876 expressly authorized the Legislature to classify occupations for purposes of taxation (Section 2, Article 8), this was not a grant of new power to the Legislature, but simply operated as an express recognition of an existing power. In fact, in case of all taxes other than those upon property and those upon incomes, the courts of this state have uniformly held that the Legislature has the inherent power to classify the subjects of taxation. *Stuard vs. Thompson*, *supra*; *Solon vs. State*, *supra*; (poll taxes); *Texas Banking & Ins. Co. vs. State*, *supra*; *Blessing vs. City of Galveston*, *supra* (occupation taxes). The question of the power to classify the subjects of income taxation has never been considered by the courts of this state.

However, in view of what has been said in the foregoing paragraphs of this opinion, we think it is undoubtedly within the power of the Legislature to classify, as it may deem expedient, the subjects of taxation for the purpose of levying and collecting an income tax, so long as the classifications made are reasonable and not arbitrary.

Has the Legislature the power in imposing an income tax, to classify the subjects of taxation according to the ability of the taxpayers to bear the burden of taxation? In the absence of constitutional restriction, as has been heretofore noticed, the Legislature can classify the subjects of taxation other than property, and may likewise subclassify them. Where the Constitution does not make a classification of the subject of taxation, and the Legislature has the power to classify subjects to the requirement that the tax imposed be equal and uniform, the Legislature is vested with wide discretion and the courts will not hold a classification made by the Legislature invalid, unless it is clearly unreasonable or arbitrary: *Texas Banking & Ins. Co. vs. State*, *supra*.

In South Dakota, the constitutional restrictions upon the power of the Legislature, with reference to taxation, are very similar to those limitations contained in our constitution. In passing upon the validity of a graduated inheritance tax, attacked as being in violation of the constitution of that state, the Supreme Court, in the case of *Re McKennan's Estate*, 27 S. D. 136, 130 N. W. 33, Ann. Cas. 1913D, 745, 33 L. R. A. (N. S.) 606, said:

"It is clear from all these decisions that the legislature may make any proper classification of recipients of inherited estates, for the purposes of such taxation, that it chooses, so long as there is equality and uniformity between those within and constituting each separate class. It also follows that, if the legislature has the right to classify on some proper recognized basis, it is not within the judicial province of the courts to say what such classification shall be, so long as the legislature is within the limits of such proper basis. In other words, the courts will not 'race opinions' with the legislature as to which might create the better law."

In other words, whether a particular classification would be invalid

as lacking in the equality and uniformity required by the Constitution, would depend upon whether the classification made is reasonable and not arbitrary. The classification of the subjects of taxation by the Legislature is largely a question of policy to be determined by that body, in the exercise of wide discretion, where it has the power to classify, and its determination will not be disturbed by the courts unless clearly arbitrary. 9 Texas Juris, 559, Sec. 121.

It is the purpose of the requirement that taxes be equal and uniform, that the *burden* of taxation shall bear equally upon the taxpayers. Texas Banking & Ins. Co. vs. State, supra. It would seem, therefore, that where the Legislature has the power to classify, any classification it might make which would distribute the *burden* of taxation equally and uniformly upon the subjects of taxation could not be said to violate the equality and uniformity clauses of the Constitution.

The theory of a graduated income tax is to distribute the burden of taxation according to the ability of the taxpayer to bear that burden. Shaffer vs. Carter, 252 U. S. 37, 51, 40 Sup. Ct. 221, 225, 64 L. Ed. 445. It is submitted, therefore, that the Legislature of the State of Texas has the power to classify persons for the purpose of imposing an income tax, with reference to their ability to pay and that the classification so made by the Legislature would be valid, unless the same is clearly unreasonable or arbitrary. This method of classification is not regarded as unreasonable or arbitrary by the United States Supreme Court. Shaffer vs. Carter, supra; Lawrence vs. Tax Commission, 52 Sup. Ct. 556.

Has the Legislature the power to impose different rates of taxation upon the several classes of persons which it has segregated according to the amount of income the members of the class receive annually?

The constitutional requirement that taxation be equal and uniform is, as has been pointed out, the only limitation upon the power of the Legislature in regard to the levying of taxes upon subjects of taxation, other than property. The equality and uniformity requirement is met when the rate of tax imposed upon any given class of subjects is the same upon each member of that class. Cooley, Taxation, (4th Ed.) Vol. 4, Sec. 1752, p. 3486; Texas Co. vs. Stephens, supra; Norris vs. City of Waco, supra; State vs. G. H. & S. A. Ry. Co., 120 Tex. 173, 97 S. W. 71 (reversed on other ground, 210 U. S. 217); Brooks vs. State, 53 S. W. 1032 (Civ. App.)

Therefore, having reached the conclusion that a tax on income is not a tax on property in the sense that term is used in our Constitution, and that for this reason a tax on income is not required to be laid ad valorem, and having reached the further conclusion that the Legislature in exercising its power of classification, may segregate persons according to the amount of income annually received, for the purpose of income taxation, subject to the constitutional limitation that the rate of taxation shall be the same upon all members of a particular class, it is our opinion, and you are advised, that the Legislature may impose a graduated income tax under the Constitution of the State of Texas.

2.

With reference to the question of the authority of the Legislature to levy an income tax, with separate and distinct rates applicable to natural persons and corporations, we think the rule is correctly stated in 4 Cooley on Taxation (4th Ed.) Sec. 1752, that "There may be a separate classification with different rates, etc., of individuals and corporations", for the purpose of imposing an income tax. This proposition is also sustained by the following authorities: 26 R. C. L. Sec. 117, p. 143; Black on Income and other Federal Taxes, (3rd) Sec. 44, and cases cited; Robertson vs. Pratt, 13 Hawaii, 590; State vs. Frear, supra; Stanffer vs. Crawford, 248 S. W. 581, 585 (Mo.); Featherstone vs. Norman, supra, and cases cited therein; Lawrence vs. Tax Commission, supra.

3.

Having the power to classify the subject of taxation other than property, and likewise to subclassify them, it is well settled that the Legislature may provide exemptions of certain of the classes created, subject to the limitation that the classification so made and the exemption granted is based upon reason and is not arbitrary. Therefore, we are of the opinion, and you are advised, that an income tax statute would not be unconstitutional because it exempts incomes under a certain amount. 26 R. C. L. Sec. 124, p. 152; 4 Cooley, Taxation, (4th ed.) Sec. 1752; p. 3487; Stuard vs. Thompson, supra; Solon vs. State, supra; State vs. Pinder, supra; Featherstone vs. Norman, supra.

4.

Answering your question with reference to the power of the Legislature, in session in 1933, to levy an income tax on the entire net income for the 1933, including that portion of the net income received during that portion of the year prior to the effective date of the law imposing said tax, we adopt the language of H. C. Black, in his work "Income and Other Federal Taxes," (3rd ed.) found in Sec. 22 of that work:

"On general principles and irrespective of explicit constitutional limitation, a statute imposing an income tax may subject to taxation the income of the citizens for the whole of the current year in which the statute is passed, that is, not only so much of the income as accrued from the date of the enactment of the law to the end of the year, but also that portion which accrued or was earned from the beginning of the year to the date of the law. For the year's income is treated and considered as one entire thing, not as made up of several portions or items. And hence, although the statute might be called retrospective in its operation upon a part of the first year's income, it is not retrospective in such sense as to render it unconstitutional."

We think this proposition is sustained in this State in the case of Cadena vs. State, 185 S. W. 367, 368, (Civ. A., error refused); Fly, C. J., speaking for the Court of Civil Appeals, said, in part:

"Laws authorizing taxes are not retrospective so far as the year in which they are authorized is concerned."

Yours very truly,

GAYNOR KENDALL,

SCOTT GAINES.

Assistant Attorney General.

Op. No. 2912

COMMISSIONERS' COURT—JURISDICTION—ARTICLES 7346, 7347 AND
7350, R. C. S., 1925.

1. Where an assessment of properties for 1930 was considered by the Board of Equalization and the values of some of the real estate therein were increased by the court, the assessment approved and entered regularly on the rolls of the tax assessor, and the Board had adjourned, said assessment being protested by the owner of the property at the time, and afterwards, upon the application of the taxpayer, the commissioners' court of the county, in the following year, under Article 7346 of the statute, had the right to inquire into said assessment and hear evidence on the same, and if it found said assessment invalid, it had the right and authority to set such assessment aside and cause said property to be re-assessed and placed on the rolls at the re-assessed valuation, to the end that the taxes thereon might be collected.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, February 13, 1933.

*Honorable Geo. H. Sheppard, State Comptroller, Public Accounts,
Austin, Texas.*

Attention: Mr. J. W. Stewart

In Re: Assessment of Mound Company on real property, 1930, re-assessed by order of Commissioners' Court in 1931.

DEAR SIR: We have your letter relating to the above matter, and a reply, for various reasons, has been postponed until this time. The questions presented are novel and difficult and have received much serious consideration by the writer.

Your letter containing the questions you propound, together with your statement of the facts, is as follows:

"I am herewith submitting to you a question, or questions, for an opinion from your department which I consider of very grave importance, as there are several questions involved:

"In the year 1930 the Freeport Sulphur Company rendered to the Tax Assessor of Brazoria County, in the name of the Mound Company, the real estate owned by this company for three million and some odd dollars. The Commissioners' Court, sitting as a Board of Equalization, raised the valuation of the property to something over ten million dollars. The court adjourned as a Board of Equalization and the tax rolls of that county for the year 1930 were made up with the property of the Mound Company carrying something over ten million dollars in valuation. The rolls were duly approved by the Commissioners' Court and the Assessor collected his fees for assessing this county on the valuation shown on the rolls of the county including the ten million and odd dollars of the Mound Company.

"In July of 1931 the Commissioners' Court cancelled the assessment of the Mound Company but did not state in any of the orders the reason for

such cancellation. They ordered the Assessor to re-assess the property of the Mound Company for the year 1930, which he did, and they proceeded to equalize the values placed on this assessment by the Assessor by fixing the value at \$6,281,160.00 and ordered the Tax Collector to accept payment of the taxes on this \$6,281,160.00, which he did.

"This supplemental roll, which constitutes the assessment of the Mound Company as re-assessed by order of the Commissioners' Court, was filed with this department, and also the Collector's report forwarding the State taxes on the valuation fixed in this supplemental assessment.

"This department has always required where there were cancellations of taxes on lands that the reason be given for such cancellation before the department felt that it was justified in approving the cancellation. The County Judge and Commissioners' Court of Brazoria County refused to give a reason for the cancellation of the assessment of the Mound Company for the year 1930.

"The Comptroller's Department is charged with the duty of accepting or rejecting the cancellation on this property, and also with the acceptance and approval or the rejection of the supplemental assessment of this property as submitted in this supplemental roll.

"If we accept and approve this supplemental tax roll then under the statute that the court claims to be acting the Assessor would be entitled to the same fees for making the assessments on his supplemental roll as he would be for making the regular assessments of his county, and to allow these fees would mean that the Tax Assessor of Brazoria County had received fees twice for assessing the same property.

"Now, the questions on which I desire an opinion from your department are as follows:

"First: Had the Commissioners' Court of Brazoria County the authority to cancel the assessment of the Mound Company without giving a reason for such cancellation after they had adjourned as a Board of Equalization for the year 1930? .

"Second: Would the Comptroller's Department be justified in accepting and approving the cancellation of the assessment of this property for the year 1930 and the accepting and approving of the supplemental tax roll made up on the order of the Commissioners' Court under a re-assessment of this property for the year 1930; and, if so, would the department be justified in paying to the Tax Assessor the fees for making this re-assessment as provided for under this Chapter under which the Court claimed to have acted in making this cancellation and re-assessment?

"Third: The Tax Collector, in accepting payment of the taxes on this supplemental tax roll and on the property of the Freeport Sulphur Company, charged interest from the date on which the property would become delinquent up to the time of payment. Did he act within his rights in making a charge of interest for the period specified?"

Accompanying your letter is a copy of the original rendition of said Mound Company of its property in 1930, showing the rendition of something more than 3,000 acres of land owned by it and situated in Brazoria County, consisting of twenty-one separate tracts, each tract being valued separately and the total rendition amounting to \$3,715,820.00, as rendered by the company.

The record also shows that the board of equalization increased the valuation on four of said tracts, thereby increasing the total rendition to \$10,781,160.00. The record further shows that said Mound Company was represented by counsel at the hearing of said matter by the board of equalization.

The increased valuations of said property were entered upon the rolls of the tax assessor. Later, said Mound Company tendered to the tax assessor the amount of its taxes, computed on the valuation

of said property, as given in the company's rendition, which tender was refused.

Said Mound Company made application to the Commissioners' Court of Brazoria County in the first part of July, 1931, asking said Commissioners' Court to cancel the 1930 assessment of its said real property, claiming said assessment to be "invalid and of no force or effect because, among other reasons, said Commissioners' Court, sitting as a board of equalization in 1930:

"(a) Failed to give to the taxpayer the necessary statutory notice of its intention to increase such valuation; and otherwise failed to comply with the statute in organizing and acting as a board of equalization;

"(b) Had not complied with the various statutory requirements in order to secure jurisdiction and authority to increase the value of the taxpayer's property;

"(c) Adopted a fundamentally wrong principle and method of valuing the property of the taxpayer; and

"(d) Excluded all testimony offered by the taxpayer showing discrimination against such taxpayer, especially testimony showing that the percentage of value said court had announced it proposed to place on the taxpayer's property was not used by the tax assessor and said court in valuing other properties in Brazoria County."

This application was heard by said commissioners' court on the 10th day of July, 1931, and was sustained, and the judgment of the court was entered of record and ordered said properties to be re-assessed for the year 1930 and ordered the county judge to prepare a list of same in triplicate, said judgment containing the following recital:

"And the Court having heard evidence, and having considered the evidence introduced at the hearing held before this Court, sitting as a Board of Equalization during the year 1930, concerning the valuations to be placed on the above described real estate for purposes of taxation, and having also considered the evidence introduced before this Court, sitting as a Board of Equalization during the year 1931, concerning the valuations to be placed on the above described real estate for purposes of taxation, and having considered other evidence, the Court is of the opinion and now finds that said assessment on said real estate for the year 1930 is invalid, and the same should be and is now by this Court ordered, adjudged and decreed to be invalid and cancelled, together with all proceedings had thereunder and/or in connection therewith by the Tax Assessor, the Tax Collector and/or other officials."

The minutes of said court further recite that on the same day, to-wit, on the 10th day of July, 1931, the Honorable J. T. Loggins, as County Judge of Brazoria County, in pursuance of the order above referred to, submitted to said court lists of said renditions in triplicate, containing full description of the properties described in said order and said court ordered that the lists of properties so prepared and submitted to the court by the county judge be referred to the tax assessor of Brazoria County, who was directed to re-assess each item of said property, and all of the same, for the year of 1930 and to submit said assessment to the commissioners' court.

The minutes of said commissioners' court further shows that in

pursuance of said order, W. S. Sproles, Jr., Tax Assessor of Brazoria County, and the owners of said property by their attorneys, appear before the said court, and that thereupon a hearing was had upon the valuation of said property as placed by the tax assessor and the minerals therein and thereunder for the year of 1930.

Said minutes further recite that the court heard evidence and fully considered the matter and was of the opinion that the valuations placed on said real estate in said rendition by said tax assessor (meaning the value placed by the assessor on his re-assessment of said properties) are excessive and unreasonable and that said valuations should be reduced to the sum of \$6,281,160.00, and judgment was rendered fixing that as the total valuation of said properties, a separate valuation being placed upon each separate tract of land.

The Court further ordered that the tax assessor cause the taxes to be computed and extended according to said values for the year 1930, and directing that a list of said properties, with the values as fixed by the court, be filed by the tax assessor with the tax collector of Brazoria County, and ordering said collector to accept payment of said 1930 taxes as computed and extended, as aforesaid, and to issue proper receipt therefor.

It appears that said Mound Company paid to the county tax collector, the State and county taxes for 1930 under and in accordance with said re-assessment of its properties; that said tax collector reported and remitted the State's portion of said taxes to the State Comptroller, covering the county taxes into the county treasury; that the State Comptroller refuses to accept said taxes on the ground that the commissioners' court had no authority to re-assess said property and reduce the valuation thereof in the manner pursued by it, but that said Mound Company is due and should pay the taxes on said property according to the valuations fixed by the board of equalization of said county in 1930.

This department is called upon for an opinion determining the issues which have been developed by the above facts.

Article 7206 provides for the commissioners' courts' convening and sitting as a board of equalization and prescribes the powers and duties, among others being:

"To examine, equalize and correct assessments made by the assessor, and when so revived, equalized and corrected, to approve the same."

Article 7212, in regard to the exercise of said powers by the board of equalization, provides:

"Said court, after hearing the evidence, shall fix the value of such property in accordance with the evidence so introduced and as provided for in the preceding article; and their action in such case shall be final."

The decisions are uniform that the excessive valuation of property is not a sufficient ground to set aside the action of the Board, where the same is the result merely of a mistake of judgment. Early

vs. City of Waco, 3 S. W. (2d) 131; G. C. & S. F. Ry. Co. vs. State, 9 S. W. (2d) 1051

In 1891 the State Constitution was amended so as to give "appellate jurisdiction and general supervisory control over the county commissioners' court, with such exceptions and under such regulations as may be prescribed by law," Article 5, Sec. 8.

No method of appeal has been prescribed by the statute, and the district court exercises its jurisdiction to revise the action of commissioners' court by original proceedings instituted by complaining taxpayers, or by claimed illegality on the part of the Board, asserted as the defense to a suit by the State to collect delinquent taxes.

In very many cases the district court has taken jurisdiction of complaints by taxpayers and judicially reviewed the valuation placed upon the property by the commissioners' court, acting as a board of equalization. A few of said cases are:

Martin vs. Alexander, 218 S. W. 653; Haverbeeken vs. Hale, 109 Tex. 106; Dreuscow vs. Baker (Com. App.), 299 S. W. 493; G. C. & S. F. Ry. Co. vs. State, 9 S. W. (2d) 1051; Randals vs. State, 15 S. W. (2d) 715.

The serious question is whether the Commissioners' Court of Brazoria County had the authority to revise the assessment of the Mound Company, as it did, or whether the complaining taxpayer would be required to go to the district court for relief.

In the case of Clawson Lumber Co. vs. Jones, 49 S. W. 909, the Court of Civil Appeals held:

"After the approval of the roll by the board of equalization, it had no further jurisdiction in the matter and the order of the commissioners' court, made February 21, 1898, reducing the assessment, was void for want of authority in the court to make the order.

"Sayle's Civil Statutes, 1897, Article 5120, 5123, 5126, 5128; Duck vs. Peeler, supra."

It has been held that the action of the assessor and the commissioners' court on questions of valuation is res adjudicate. State vs. Conts' Estate 149 S. W. 281; Railway vs. Harrison, 54 Tex. 119; Clawson Lumber Co. vs. Jones, 29 S. W. 909.

The above holdings are announced in cases in which it appears that the board of equalization proceeded legally and regularly, and the same do not militate against the proposition stated above, and supported by the cases cited, where a board of equalization acts illegally or fraudulently to the injury of a taxpayer, its action may be reviewed and revised by the district court.

The opinion in the above case of Clawson Lumber Company vs. Jones, was handed down in 1899, under the statutes then existing, that opinion was unquestionably sound, there being no act of the Legislature, or constitutional warrant, for the commissioners' court to revise the action of the board of equalization by reducing assessed valuations, but subsequent to that opinion, statutes were enacted under which the Commissioners' Court of Brazoria County claimed to act and which purport to give or grant to commissioners' courts

the right and authority to cancel invalid assessments and for properly re-assessing, just as was done in this case.

This authority, and the method of procedure, are set out in Articles 7346, 7347, 7348, and 7349, Revised Civil Statutes, 1925, said provisions having been enacted in 1905. Article 7346 is as follows:

“Whenever any commissioners court shall discover through notice from the tax collector or otherwise that any real property has been omitted from the tax rolls for any year or years since 1884, or shall find that any previous assessments on any real property for the years mentioned are invalid, or have been declared invalid for any reason by any district court in a suit to enforce the collection of taxes on said properties, they may, at any meeting of the court, order a list of such properties to be made in triplicate and fix a compensation therefor; the said list to show a complete description of such properties and for what years such properties were omitted from the tax rolls, or for what years the assessments are found to be invalid and should be canceled and re-assessed, or to have been declared invalid and thereby canceled by any district court in a suit to enforce the collection of taxes. No re-assessment of any property shall be held against any innocent purchaser of the same if the tax records of any county fail to show any assessment (for any year so re-assessed) by which said property can be identified and that the taxes are unpaid. The above exception, with the same limitations, shall also apply as to all past judgments of district courts canceling invalid assessments.”

Attention is called to that part of Article 7346 which provides:

“Whenever any commissioners’ court shall discover through notice from the tax collector or otherwise that any real property has been omitted from the tax rolls for any year or years since 1884, or shall find that any previous assessments of any real property for the years mentioned are invalid, or have been declared invalid for any reason by any district court in a suit to enforce the collection of taxes on said property, they may, at any meeting of the court, order a list of such properties to be made in triplicate,” etc., and proceed precisely as was done in this case.

It would appear that the commissioners’ court has the right, under this and succeeding articles, to correct or remedy assessments that are invalid, regardless of what it is that renders them invalid, and that the article purports to give the commissioners’ court authority to cancel an assessment on any ground of invalidity for which a district court may set aside or cancel an assessment.

We think this true because the term “invalid” is used in *pari materia*, in close connection and in stating the basis for any action by the commissioners’ court, and also the basis of action by the district court in setting aside an assessment, so that if this law is constitutional; that is, if the Legislature had the power to confer this authority on the commissioners’ court. It occurs to us that the action of the commissioners’ court under consideration was legal.

In this connection attention is called to the dual capacity in which the commissioners’ court may act:

1. As a court to attend to the business of the county in general; and,
2. As a special tribunal, or body, when it acts as a board of equalization. When the members of the court convene as a board of equalization and discharge its duties by correcting and equaliz-

ing assessments and approving the assessment lists and then adjourns, it ceases to exist as such tribunal and is given no authority to revise its own action at a later date.

Article 7346, et seq., does not purport to give the board of equalization any authority, but the authority which it does confer is conferred upon the commissioners' court, and we desire next to consider the question as to whether or not the authority set forth above is such as can be conferred upon the commissioners' court.

Section 1 of Article 5 of the State Constitution provides, in part, as follows:

"The judicial power of this State shall be vested in one supreme court, in courts of civil appeals, in a court of criminal appeals, in district courts in county courts, in commissioners' courts, in courts of justices of the peace, and in such other courts as may be provided by law."

It will thus be seen that commissioners' courts are created and made the receptacle of judicial power by the Constitution. The jurisdiction of said court is defined in the latter part of Section 18 of said Article 5 in the following words.

"The county commissioners so chosen, with the county judge as presiding officer, shall compose the county commissioners' court, and shall exercise such powers and jurisdictions over all county business as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed."

We believe that the Constitution does not undertake to vest the commissioners' court with jurisdiction of any particular matters, but authorizes said court to exercise whatever power and jurisdiction the Legislature may confer upon it; provided, we think, the same is limited to "county business." Said courts are held to be courts of limited jurisdiction in that they have no authority except such as is expressly or impliedly conferred. *Von Roesenberg vs. Lovett*, 173 S. W. 508; *Miller vs. Brown*, 216 S. W. 452.

It is also held that commissioners' courts are courts of general jurisdiction in the sphere of the power conferred on them. *Bradford vs. Mosley* (Com. Appeals) 223 S. W. 171, reversing judgment of Court of Civil Appeals, same case, 190 S. W. 824.

This means, among other things, that their judgments import verity and are not subject to collateral attack.

We think that grounds for invoking the jurisdiction of the commissioners' court, stated in subdivisions (c) and (d) of the application of the Mound Company, unquestionably state grounds which, if true, would render the 1930 assessment void. The judgment of the court rendered upon such hearing recites that it heard evidence on said application and considered the same, and, while it does not set forth the court's findings of fact, same does recite that, from the evidence heard and considered, the court was of the opinion that the 1930 assessment was invalid and should be set aside and the property re-assessed, and upon such conclusion the court rendered its judgment accordingly. As to the conclusiveness of that

judgment, we cite the following from 11 Texas Jurisprudence, under the title "Counties" paragraph 37:

"Commissioners' courts are courts of general jurisdiction when acting within the sphere of the powers and duties conferred upon them, and the judgments of these courts are entitled to the same consideration as those of other constitutional courts. Their judgments may not be collaterally attacked."

While the constitution gives the district court general supervision of the commissioners' court, when the commissioners' court makes an order or enters a judgment in the exercise of its judicial discretion, the same is conclusive and will not be controlled or reviewed even by the district court, unless proof is made of a clear abuse of discretion or of collusion or fraud. *Polk vs. Roebuck*, 184 S. W. 513; *Hill County vs. Sauls*, 134 S. W. 267.

It is true that the jurisdiction of commissioners' courts is limited to strictly "county business," and the Legislature has no authority to enlarge their powers or jurisdiction. *Sunvapor Electric Light Co. vs. Keenan*, 88 Tex. 197; 30 S. W. 868.

Any attempt to confer upon the court jurisdiction of a matter which is not "county business" is void. *Id. Rankin vs. McCallum* 60 S. W. 975.

The term "county business" should be given a broad and liberal construction, so as not to defeat the purposes of the law.

We are of the opinion that the matter of examining, investigating and considering an assessment of taxes, and determining whether the same is invalid or not; and, if found to be invalid, to do the things as authorized by law to have property covered thereby re-assessed in such manner as that the taxes thereon may be collected, all pertains to "county business." It would seem that it is as much "county business" to examine into, ascertain and determine an assessment to be invalid and to have the same re-assessed in a valid manner, as it is to inspect tax renditions, hear evidence thereon, and determine and equalize the valuations, which matters are unquestionably county business and properly intrusted to the commissioners' court, acting as a board of equalization.

Article 7350, Revised Civil Statutes, 1925, authorizing the commissioners' court to reduce the assessment in cases of delinquent taxes of unrendered and unknown property, when such valuation is excessive and unreasonable, is an entirely different provision from the ones under consideration. This latter relates only to delinquent taxes of unrendered and unknown property.

Article 7346 seems to relate only to property that had been previously assessed, but in such manner, or for some reason, the assessment is invalid. We think both relate to "county business" and that the powers and duties prescribed therein have been properly delegated to the commissioners' court.

In the opinion of this department, the jurisdiction delegated to the commissioners' court under Articles 7345 and 7347 constitutes a legal and valid delegation of power and that the action of the

Commissioners' Court of Brazoria County, as detailed in the statement of the facts of this case, being in strict accordance with the directions of said statutes, is in all things valid and binding.

We therefore advise, in direct answer to your question, that the commissioners' court had the authority to cancel the 1930 assessment of the Mound Company without stating the evidence or reasons upon which such action is based. The Comptroller's Department would be justified in accepting and approving the cancellation of the assessment of this property for the year of 1930 and in accepting and approving the supplemental tax roll made up on the order of the commissioners' court under a re-assessment of this property.

It appearing that the tax collector had received his commissions for assessing the property at an excessive valuation of 1930, and that such assessment had been set aside and the same property re-assessed for the same year, we submit that he would not be entitled to commissions on this re-assessment. Whether or not the collector was authorized to charge and receive interest on the supplemental tax roll from the time the property under the old assessment would have become delinquent, the taxpayer having voluntarily paid the same, the interest should be retained and treated as if legally collected.

Yours very truly,

F. O. MCKINSEY,
Assistant Attorney General.

Op. No. 2865.

CIGARETTE TAX—INTERSTATE COMMERCE.

Where orders are solicited by traveling agents for the sale of cigarettes by a foreign corporation to customers within the State of Texas and such orders are forwarded to the home office and the cigarettes are shipped in bulk to Texas, and then subsequently reshipped to the various customers in Texas upon such orders by an agent to whom such goods are shipped, such transactions do not constitute intrastate commerce and such foreign corporations or their agents cannot be required to pay the tax and affix the stamps.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, August 12, 1931.

Honorable Charley Lockhart, State Treasurer, Austin, Texas.

DEAR SIR: This will acknowledge receipt of your recent letter to this department wherein you make certain inquiries with reference to the cigarette tax law. The facts and questions upon which you desire an opinion are as follows:

"The Terminal Warehouse Company of Houston, a public warehouse situated in that city, has certain contracts with the four larger manufacturers of cigarettes, the material portion of such contracts and the manner and method in which these manufacturers conduct their business in Texas being substantially as follows:

"The manufacturers have several hundred salesmen in the State who solicit orders from wholesalers and retail dealers within the State and after the same are obtained such orders are sent out of the State to the home office of such manufacturers. The orders are then passed upon by such manufacturers and forwarded to the Terminal Warehouse Company at Houston with instructions to fill such orders and to make shipments to the various dealers on such orders to all points in Texas. The manufacturers ship the cigarettes pursuant to such orders in bulk, either by boat or car lots to the terminal warehouse in Houston and it meets the boats or cars, unloads the cigarettes, takes them to the warehouse and reships them as heretofore stated upon said orders. The manufacturers do not rent the warehouse nor have any salesmen or employees at the warehouse, nor do they make any sales in Texas from such warehouse in any other manner than above described. They pay the warehouse company five cents on each 10,000 cartons of cigarettes so handled by it. The Warehouse Company collects no money nor makes any sales whatsoever. The amount of cigarettes shipped to the warehouse, of course, is based upon the volume of orders obtained in Texas. The reason for shipping in car lots or by boat is that there is a great saving made on the freight rate. The manufacturers do not have any general offices in Texas, general agents or other employees than the salesmen above mentioned. The manufacturers of these cigarettes contend that they are engaged in interstate commerce and inasmuch as the tax does not accrue until the first intrastate sale they should be required to affix the stamp. They further contend that in the event they should be required, under a construction of the act, to affix the stamps that they will be compelled to withdraw from the State without even litigating the matter. Inasmuch as they have no investment in the State they contend it will not be inconvenient for them to withdraw to Shreveport or some other city within the State of Louisiana and ship direct to the dealers or wholesalers, and by this arrangement there would be no question but what the same was an interstate transaction and they could avoid affixing the stamp.

"The Warehouse Company is very much concerned over this matter for they are faced with the possibility of losing the business in the event these companies should withdraw from the State.

"Will you kindly advise me in this connection at your earliest convenience."

The question with which we are confronted in answering your inquiry is whether or not the tax recently enacted, known as the cigarette tax, can be imposed upon and collected from the manufacturers without interfering with, or imposing a burden upon, interstate commerce. The ultimate question then to determine is whether or not the transactions as set forth in your statement of facts constitute intrastate commerce or interstate commerce. If intrastate commerce, of course the manufacturer will be required to pay the tax and affix the stamp.

It is too well settled to be questioned that the various states have delegated to Congress the power to regulate commerce between the various states. *Mobile vs. Kimball*, 102 U. S. 691; *Railroad Commission vs. Worthington*, 255 U. S. 101; Article 1, Section 8, Constitution of the United States.

While the above section of the Constitution of the United States does not, by specific terms, prohibit the states from legislating on interstate commerce, it has been construed by the Supreme Court of the United States that, by implication, it excludes the states from passing any legislation with reference to the same. *Brown vs. Maryland*, 12 Wheat. 419; *American Steel Wire Company vs. Speed*, 192, U. S. 500.

It is equally well settled that a state may impose an occupation tax upon one engaged both in interstate and intrastate commerce but the tax, however, in order to be valid, must be imposed solely on account of the intrastate commerce without any enhancement due to the interstate business and it must clearly appear that one engaged exclusively in interstate business would not be subjected to such tax, and that one doing a dual business could discontinue the intrastate business and not be subject to any further imposition of the tax upon the interstate business. *East Ohio Gas Company vs. Tax Commission* (U. S.) 51 L. Ed. 499; *Sprout vs. South Bend*, 277 U. S. 163.

A tax which is imposed upon the gross receipts from interstate transportation, whether or not receipts derived from intrastate transportation are equally taxed, is an unlawful tax because a burden upon interstate commerce. *G. H. & S. A. Railway Co. vs. Texas*, 210 U. S. 217; *Crew Livick Co. vs. Pennsylvania*, 245 U. S. 282; *Philadelphia Steamship Co. vs. Pennsylvania*, 122 U. S. 326.

It has also been repeatedly held that a tax upon sales of merchandise made within a state to be subsequently delivered across a state line from another state is an unlawful tax. It has equally been held that a drummer or salesman employed for the purpose of soliciting orders for such sales is exempt from occupation or license tax. Both of such transactions are, in their essence, interstate commerce and any State tax upon them is a regulation of, and a burden upon, interstate commerce. *Asher vs. Texas*, 128 U. S. 129; *Robbins vs. Shelby County*, 120 U. S. 489; *Caldwell vs. North Carolina*, 187 U. S. 622; *Dozier vs. Alabama*, 218 U. S. 124; *Grenshaw vs. Arkansas*, 227 U. S. 389.

In the case of *Caldwell vs. North Carolina*, supra, the City of Greensboro enacted an ordinance in pursuance to powers conferred upon it whereby a license tax was imposed upon every person engaged in the selling or delivering of picture frames, pictures, photographs or likenesses of the human face, whether an order for the same shall have been previously taken or not. The defendant, Caldwell, was arrested for not complying with such law and set up the defense that his transactions constituted interstate commerce and that any tax imposed upon him in carrying on the same constituted a burden upon the same and was unlawful. The facts showed that the portrait company for which he was working was a foreign corporation and had its office and place of business in another state and that he was only an agent acting for the company in the State of North Carolina and that he would solicit orders for portraits and pictures, together with frames, and send such orders out of the state to the home office to be manufactured and returned to him. For convenience the company would send the picture and frames in separate packages to Caldwell, and he would assemble the pictures in the frames and deliver them in pursuance to the orders which he had previously secured and sent to the home office. The Court held that these transactions were interstate commerce and that the defendant could not be required to pay the license tax for the same would be a burden on interstate com-

merce and, in disposing of this question the Court had the following to say:

"Nor does the fact that these articles were not shipped separately and directly to each individual purchaser but were sent to an agent of the vendor at Greensboro, who delivered them to the purchasers, deprived the transaction of its character as interstate commerce. It was only that the vendor used two instead of one agency in the delivery. It would seem evident that if the vendor had sent the articles by an express company which should collect on delivery, such a mode of delivery would not have subjected the transaction to State taxation. The same could be said if the vendor himself or by a personal agent had carried and delivered the goods to the purchaser. That the articles were sent as freight by rail and were received at the railroad station by an agent who delivered them to the respective purchasers in no wise changes the character of the commerce as interstate."

The Legislature evidently having in mind the restrictions placed upon its power to enact any legislation which would contravene the commerce clause of the Constitution of the United States as reflected by the authorities above cited, provided that the tax shall accrue on the first sale in intrastate commerce. The pertinent portion of said statute with reference to the accrual of the tax is as follows:

". . . There is hereby levied a tax on all sales in intrastate commerce in this state of cigarettes. . . such tax shall only be paid once on account of any cigarettes so sold by the person, firm or corporation making the first sale in intrastate commerce in this State."

Query: Do the above facts show sales in intrastate commerce?

We have not been able to find a case directly in point bearing on this question but we have a line of decisions by the Supreme Court of Texas with reference to whether or not a foreign corporation, under the facts in each particular case, was doing business within the State which we think, by analogy, control under the facts as presented in the present case. *John A. Dickson Publishing Company v. Bryan* (Comm. Apps.) 5 S. W. (2d) 980; *Miller v. Goodwin*, 91 Texas 41; *Allen v. Tyson Jones Buggy Company* (Sup. Ct. of Texas) 40 S. W. 393; *Smythe v. Fort Worth Glass & Sand Company*, 105 Texas 8; *McCaskey Cash Register Company v. Mann*, 273 S. W. 1113.

In the case of *Dickson v. Bryan*, supra, the facts showed that the Dickson Publishing Company was a foreign corporation engaged in printing and publishing an indexed Bible and appointed B. D. Dickson as general sales agent in the State of Texas with the power to appoint sub-agents for the purpose of selling and distributing within the State of Texas said Bibles. Dickson was charged with the duty of collecting and accounting to the publishing company, and in order to secure his faithful performance of such duties the publishing company required him to execute bond. He defaulted in payment and suit was brought to recover upon the bond. The defense was interposed that, under the facts, the publishing company was doing an interstate business within the State and had not obtained a permit as required of foreign corporations under the laws of this state and, therefore, had no standing in Court. It was held by the

court in this case that the publishing company was engaged in interstate commerce. The opinion was written by Judge Leddy and approved by the Supreme Court, and in the course of his opinion he used the following language:

"Shipping merchandise from another into this state upon orders of soliciting agents constitutes commerce between the states and can only be regulated by Congress. The Legislature is without power to bring such transactions within the scope of our statutes. . . . The fact that the books were shipped to the soliciting agents for delivery instead of to the purchaser direct does not have the effect of removing the interstate character of the transaction. It was so held in *Caldwell vs. North Carolina*, 187 U. S. 622. . . . If the sales were made to Dickson's agents under orders made by them under the supplemental contract, or were made to purchasers on orders sent in by agents, in either event the transaction would be one of interstate commerce."

In the case of *Tyson Jones Buggy Company*, supra, the facts showed that the buggy company was a foreign corporation and that firm by the name of Southworth & Keesee were acting as commission agents for the buggy company in selling its buggies within the State of Texas. One of these buggies was in possession of the commission agent and levied upon by R. J. Allen, a constable. The buggy company intervened, claiming that it owned the buggy. The defense was set up that the buggy company was a foreign corporation doing business in Texas and had not taken out a permit as required by the laws of this State and, by reason thereof, had no standing in Court. The question as to whether or not the transactions as above outlined constituted interstate or intrastate commerce was discussed by the Court and in disposing of same the following language was used:

"The business which it transacted as shown by the allegations was to enter into a contract with the commission merchant to sell its buggies or phaetons on commission. The clear inference is that these buggies were introduced in this state from the State of North Carolina and so far the transaction belongs to interstate commerce and cannot be regulated in the manner prescribed by the statute quoted. . . . The selling of the buggies and phaetons, which was to be done by the commission merchants, was not a business done or carried on by the corporation."

In the case of *Miller v. Goodwin*, supra, a foreign corporation appointed agents in the State of Texas for the purpose of soliciting orders and selling its goods which were manufactured in another state. The question arose in this case as to whether or not the foreign corporation was doing an intrastate business within the State of Texas. The Court held that the conduct of such business constituted interstate commerce and in disposing of the matter, in the course of the opinion, Judge Brown had the following to say:

"Do the facts alleged show a transaction of the character of interstate commerce? We think that they clearly do. It is a case of sale by a foreign corporation created by another state of goods manufactured in that state and shipped into the State of Texas. It matters not whether the goods were sold before they were shipped or shipped to the State and then sold."

There is another well settled rule of law which may be helpful

to us in arriving at whether the transaction here under question is interstate or intrastate business, the same being well stated in Volume 9, Texas Jurisprudence, Paragraph 7, page 272:

“When a shipment is originally interstate in character it may become intrastate upon the termination of the journey. If the commodities constituting the shipment are delivered to the consignee at destination a subsequent shipment to another point in the state is an intrastate one, the interstate character of the shipment having come to an end when it reached its original destination. But if it was the intention of the shipper at the beginning of the transportation that the commodities were to be carried to a point in another state and from there to another point in the same state, the whole shipment is one in interstate commerce.”

Santa Fe Railway Company v. Fort Grain Company, 72 S. W. 419; Mexican National Railway Company v. Savage, 41 S. W. 633; Santa Fe Railway Company v. Young, 284 S. W. 664; Santa Fe Railway Company vs. Matthis, 194 S. W. 1135; State vs. S. A. A. P. Railway Company, 73 S. W. 572.

If said manufacturers' policy of conducting their business was to ship direct to each purchaser in pursuance to the orders obtained by the agents here in Texas, it could not be disputed that such transaction would be interstate commerce and they could not be required to affix the stamp. We do not think that, under the facts as stated by you, where all the orders for the sale of cigarettes are previously taken by soliciting agents in Texas and forwarded to the out-of-state manufacturers and the total of such goods as ordered are shipped in bulk to a point in Texas, for the reason that there is a great saving made in freight, then to be immediately reshipped in smaller lots to the original purchasers upon such orders previously taken and upon which the original bulk shipments were based, such transaction would constitute an intrastate sale within the meaning of the act. The facts as outlined do not make a case of storage at a centralization point for the purpose of filling orders from such stock. If they did, it would present a different question and we do not want to be understood as saying that our ruling would be the same.

This opinion, however, is based solely upon the statement of facts as set forth herein and, of course, under a different set of facts with reference to the same subject matter our holding may be different, due to the fact that each case rests upon the peculiar set of facts pertaining to it.

Yours very truly,

SIDNEY BENBOW,
Assistant Attorney General.

MISCELLANEOUS CASES

Op. No. 2818.

COMMISSIONERS' COURT—POWER TO CONTRACT FOR SERVICES OF
EXPERT IN VALUATION OF PROPERTY.

Commissioners' Court has implied authority to make a contract for skilled service in the valuation of property.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, January 17, 1931.

Mr. E. L. McHugh, County Auditor, Vernon, Texas.

DEAR SIR: The question here involves the sufficiency of a contract between Wilbarger County, Texas, acting by and through its Commissioners' Court of said county, party of the first part, and Mr. E. C. Hitchcock, a resident of said county, party of the second part.

The contract is sufficient to create a binding obligation between the parties, requiring the party of the first part to pay the party of the second part \$275.00 per month, said amount to be paid out of third class funds of Wilbarger County, for such time as the Commissioners' Court may desire the services of second party, and obligates the said second party to render assistance to the Commissioners' Court while sitting as a board of equalization in arriving at the value of oil producing properties, valuation of leases, wells, drilling rigs, pipe lines, and all other oil supplies and properties so as to enable said Commissioners' Court to place upon said property the proper valuation. The question involved is whether or not the Commissioners' Court has the authority to make such contract.

Our statutes provide that all property shall be assessed by the county tax assessor and said assessor is given authority and the power, and is required, to exercise all due care and vigilance in arriving at the proper valuation of all property in his county. The Commissioners' Court, sitting as a board of equalization, is required to equalize valuations so as to have all property bear its proper proportion of the burden of taxation and, in order to do so, is authorized to subpoena witnesses, etc.

There is no provision in our statutes that expressly authorizes the Commissioners' Court to employ an expert of one who is familiar with such property as is herein sought to be valued, or to assist the Commissioners' Court in arriving at a proper valuation of such property. But, as the law contemplates that the Commissioners' Court, sitting as a board of equalization, shall ascertain, as nearly as possible, the value of all property, the Commissioners' Court has implied authority to employ one who is skilled and an expert in working out and arriving at the real value of property such as is contemplated in the contract herein. See *Von Rosenberg, et al vs. Lovett*, 173 S. W. 508, in

which case a writ of error was denied by our Supreme Court. See also Roper, County Judge, et al vs. Hall, et al, 280 S. W. 291.

In addition to the above two Texas cases, see the following :

City of Richmond vs. Dickinson, 155 Ind., 345, 58 Me. 260.
 Disbrow vs. Board of Supervisors, 119 Iowa, 338, 93 N. W. 585.
 Shinn vs. Cunningham, 120 Iowa, 383, 94 N. W. 941.
 Burnett vs. Markley, 23 Ore., 436, 31 Pac. 1050.
 Garrigus vs. Board of Commissioners, 157 Ind., 133, Mo. App. 328, 112 S. W. 979, affirmed 240 Mo. 187, 144, S. W. 1198, Ann. Cas. 1913b, 1082.
 Prothero vs. Board of Commissioners, 22 Idaho, 598, 127 Pac. 175.
 Harris vs. Gibbons, 114 Cal. 118, 46, Pac. 290.

The Commissioners Court has the authority to make the contract specified.

Yours very truly,

J. A. STANFORD,
 Assistant Attorney General.

Op. No. 2823.

REGISTRATION MOTOR VEHICLES—PAYMENT OF REGISTRATION FEES
 BY R. F. D. CARRIERS

1. Motor vehicles, trailers, and semi-trailers, which are the property of, and used exclusively in the service of, the United States government, are exempt from payment of registration fees; provided, that affidavit is made at the time of registration by a person who has the proper authority that such vehicles are the property of, and used exclusively in the service of, the United States government.

2. Rural free delivery carriers within the State are required to pay registration fees unless the motor vehicles operated by them are shown by affidavit of a proper party to be the property of, and used exclusively in the service of, the United States government.

OFFICES OF THE ATTORNEY GENERAL,
 AUSTIN, TEXAS, January 26, 1931.

Honorable W. C. Dowdy, County Attorney, McKinney, Texas.

DEAR SIR: This will acknowledge your recent inquiry in which you ask the following question :

“Are owners of automobiles carrying the mails on the R. F. D.’s entitled to exemptions of such vehicles so carrying the mails from State registration fees?”

We find that under the old law relating to this matter the following provision was made :

“. . . and motor vehicles owned and operated under the direction of, and exclusively in the official service of, the United States government . . .”

This law, being Article 6675, Revised Civil Statutes, 1925, has been amended by Acts of the Forty-first Legislature, Second Called Session, H. B. 6, Chapter 88, page 172, and we find that the portion of the new law relating to this matter reads as follows :

"Owners of motor vehicles, trailers, and semi-trailers, which are the property of, and used exclusively in the service of, the United States government . . . shall apply annually to register all such vehicles but shall not be required to pay the registration fees herein prescribed, provided that affidavit is made at the time of registration by a person who has the proper authority that such vehicles are the property of, and used exclusively in the service of, the United States government . . .".

We are not unmindful of the fact that the Supreme Court of this State held, in the case of Louwein vs. Dan M. Moody, Tax Collector of Harris County, Texas, that one owning and operating trucks under contract for transportation of mails did so "under the direction and exclusively in the official service of the United States," within the meaning of Revised Statutes, 1925, Articles 6675 to 6679, and was entitled to exemption of vehicles from State registration fees since such fees would interfere with execution of power under the United States Constitution, Article 1, Section 8, Cl. 7. We find the Court using, in that case, the following language:

"Purpose to impose such a burden may not be attributed to the Legislature in the absence of compelling words . . . but in the exempting terms the Legislature used language subject to that interpretation which carries immunity in respect to the trucks in question. While Louwein and not the Federal government owns and operates the trucks, he does so on the facts 'under the direction and exclusively in the official service of the United States'". (12 S. W. (2nd) 989.

It is to be noted, in the first place, that this decision related to "one owning and operating trucks UNDER CONTRACT for transportation of mails" which, we think, distinguishes between those operating what are commonly called or known as star route, and those operating under the rural free delivery law or rural routes.

Attention is also called to the fact that since the above decision and holding of the court that the Legislature of this State has amended the registration laws as hereinbefore set out, that is, confining those not required to pay the registration fee to motor vehicles "which are the property of, and used exclusively in the service of, the United States government."

It seems to us that the law is clear and explicit and that rural free delivery carriers who are required, under the provisions of Article 194, United States Code, relating to the postal service to furnish all necessary vehicle equipment for prompt handling of mails, and whose compensation does not depend, in any manner, upon contract but is fixed by Article 197, United States Code, relating to the postal service, would certainly be required, under the provisions of the act, to pay the registration fees required in this State.

Applying the law to a rural carrier it will be seen, in the first place, that such rural carrier could not make the affidavit required to the effect that the property or motor vehicle was the property of the United States government, and, from a practical standpoint, and a general knowledge of the mode of operation of motor vehicle owned by rural free delivery carriers, they would not be able to make the affidavit that such vehicles were used in the exclusive service of the United States government. Since they could not make the affidavit,

required, we know of no theory of law by which they would not be required to pay these registration fees.

Having in mind especially the case hereinabove mentioned by the Supreme Court of this State, to-wit, Louwein vs. Dan M. Moody, 12 S. W. (2nd) 989 and, again, referring to the fact that this was a case where the plaintiff in error was operating trucks "under contract," the reasoning in that case was, in effect, that the United States government would be required to pay the registration fees inasmuch as contractors, in submitting bids, would naturally take into consideration the registration fees which they would be required to pay on vehicles operated by them in the transportation of mails under any such contract secured by them.

This theory of law, to our mind, could not and does not apply to rural free delivery carriers whose compensation does not depend upon contract but who are required to furnish their own equipment and whose salaries are definitely fixed and set out in the statute. Requirement of the payment of these fees would not, therefore, be in conflict with any provision of the State or Federal Constitution.

You are, therefore, advised that rural free delivery carriers within this State are required to pay the registration fees on the motor vehicles operated by them.

Yours very truly,

T. S. CHRISTOPHER,
Assistant Attorney General.

Op. No. 2824

PENSION—CONFEDERATE SOLDIER—WHO ENTITLED—ARTICLE 6205 AND 6208, WITH SUBSEQUENT AMENDMENT CONSTRUED.

1. The term "soldier" ordinarily means one who is engaged in military service, as an officer or a private; one who serves in any army or one of an organized body of combatants.

2. The term "Confederate Soldier" as used in Article 6205 and its amendments means one engaged in the military service of the Confederacy as an officer or private in units engaged in actual combat; one who served in any organization for the protection of the frontier against Indian Raiders and Mexican Marauders; militia of the State engaged in active service; one who served under the provisions of the Conscript Law on detail in armories or shops of the Confederate Government; or one who served under the provisions of the Conscript Law by performing any other labor necessary in the maintenance of the Army in the Field.

3. The following persons are entitled to receive pensions: indigent and disabled Confederate Soldiers and Sailors who have been bona fide inhabitants for at least ten years; their widows who have been bona fide inhabitants of the State for at least six years and who have not been born since 1873; indigent and disabled soldiers who served in organizations for protection of frontier against Indian Raiders and Mexican Marauders, militia of the State of Texas who were in active service during the Civil War: to widows of such soldiers who were married to such soldiers prior to January 1, 1910, the term widow not to apply to women born since 1873.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, January 26, 1931.

Hon. Geo. H. Sheppard, State Comptroller of Public Accounts, Austin, Texas.

DEAR SIR: This will acknowledge your file relating to the application of J. A. Klipper for pension under the provisions of the law relating to Confederate Pensions in this State.

In submitting this file you ask this question:

“Who is entitled to Confederate Pensions?”

This question must be determined from a construction of the Statute, after a consideration of the original act, together with all amendments down to this date, including the amendment of the Fifth Called Session of the Forty-first legislature, Chapter 82, Page 251, for those entitled to such pensions are all such persons as come within the purview of the Statute and the Legislature's intent in the enactment thereof.

Under Article 6205 and all Amendments, the same being captioned “To whom granted,” we find said Article continually using the term, “Confederate Soldier or Sailor.” Persons intended to be included within such term must be determined from the construction of the entire Statute as contained in said Article 6205, together with all the other provisions of the Statutes relating to pensions, and especially in connection with Article 6208 and its Amendments.

The term “soldier” as it is ordinarily used and referred to, and as we ordinarily think of it, refers to one who is engaged in any military service either as an officer or a private, or one who serves in an army, or one who is enlisted in an organized body of combatants and subject to be engaged in actual combat.

It seems to be apparent that it was not the intent of the Legislature to limit the granting of pensions in this State to such persons only as come within the strict terms of the definition of a “soldier” as defined in the preceding paragraph.

It seems that Article 6205, together with its Amendments, is clear and explicit, and from a consideration of this Article alone one would conclude that it was only such persons as were enlisted in military units engaged in combat, or in other words, soldiers or sailors as we ordinarily think of and apply these terms, together with their widows and the limitations thereon placed, that were entitled to these pensions. We cannot, however, stop with a consideration of this Article and its Amendments alone, but we must specifically consider Article 6208 with its Amendments in order to ascertain and determine the Legislative intent and the true scope of the Statute and the parties intended to be benefitted thereby.

In Article 6208 and all of its Amendments, we find provisions inclusive of all those whom we would consider entitled to a pension under the terms of Article 6205, but we find a further direct expression as follows:

“* * * and if detailed directly under the provisions of the Conscript Law

for duty in the armories or shops of the Confederate Government or for any other labor necessary for maintenance of the Army in the Field * * *.”

There seems to be no doubt of the meaning of these words nor of the intent of the Legislature in their use. It clearly appears from this expression that the Legislature intended to include not only those engaged in an organized body of combatants, but that they intended to include those engaged in any necessary labor for the maintenance or support of the Army in the Field, as for example, those engaged in munition factories, machine shops, engaged in the making of fire arms, wagons or any and all other machinery and equipment used by the army and as the Statute says in “any other labor necessary” provided only that their engagement in such services was under the provisions of the conscript law.

To sum up under the provisions of the Statute the following persons, if indigent or disabled, are entitled to a pension under the terms of the Act as it now exists:

(1) All Confederate Soldiers or Sailors engaged as such during the War between the States whose application has heretofore been approved, and also those who have been living within this State for at least ten years prior to the approval hereafter of his application;

(2) The widows of all such Confederate Soldiers or Sailors whose application has been heretofore approved, and the widows of such Soldiers or Sailors who have been bona fide residents of this State for at least six years prior to approval hereafter of their application, and who were married to such soldier or sailor prior to January 1, 1910. The term “widow” as used herein does not apply to women born since 1873;

(3) All those who served in organizations for the protection of the frontier against Indian Raiders or Mexican Marauders;

(4) Those who were members of the militia of the State of Texas who were in active service during the war between the States and to the widows of such soldiers subject to the limitations mentioned above;

(5) Those detailed directly under the provisions of the Conscript law for duty in armories or shops of the Confederate Government; and

(6) Those detailed directly under the provisions of the Conscript Law for any other labor necessary for the maintenance of the Army in the Field whether they were members of or belonged to organizations directly engaged in combat or subject thereto or not.

In the construction of the Statute all of its provisions must be so construed as to give effect to the entire Statute if possible, and finding no conflict in this last addition as contained in Article 6208 with reference to application requirements, with the provisions of Article 6205, the same only enlarging and broadening the scope and purview of Article 6205, it is our opinion, and you are so advised, that in the instant case that if said claim is otherwise properly

presented, the same is subject to approval as being included within the purview of this Act, and said applicant is entitled to receive a pension.

Yours very truly,

T. S. CHRISTOPHER,
Assistant Attorney General.

Op. No. 2827

CITIES—HOME RULE CITIES—POPULATION—CHANGE IN.

1. City having more than five thousand inhabitants incorporated under Section 5 of Article 11 of Constitution continues such corporation after population reduced to less than five thousand.

2. The falling off or reduction of population of such city to less than five thousand does not automatically abrogate such corporation or change its class.

3. Such a city would continue its corporate existence until same is abolished by vote of the taxpaying voters of the city.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, February 5, 1931.

Hon. Henry Taylor, District Attorney, Belton, Texas.

DEAR SIR: I have for attention your letter of the 5th ultimo addressed to the Attorney General in which you make a preliminary statement and propound two questions.

You state that the City of Belton adopted a home rule charter under Section Five of Article Eleven of the Constitution of Texas on August 20, 1914, and has continued under such charter down to the present time.

That said Section of the Constitution authorizes cities of more than five thousand inhabitants to adopt such charter. That at the date the City of Belton adopted its home rule charter, it contained more than five thousand inhabitants and that the 1920 United States census showed the City of Belton to have a population of 5098. That the charter adopted by said City authorizes the levy of a tax not to exceed One Dollar and Ninety Cents (\$1.90) on the One Hundred Dollar (\$100.00) valuation per year, which provision has not been changed.

That the 1930 United States official census shows the City of Belton to have a population of only 3,748.

That the City of Belton proposes to amend its home rule charter as follows:

(1) By providing for a managerial form of government with five or six commissioners to be elected.

(2) By increasing its authorized taxing power to Two Dollars and Fifty Cents (\$2.50) ad valorem tax on each One Hundred Dollar (\$100.00) valuation.

You then propound the following questions:

“(1) It now being definitely determined by the United States census of 1930 that the City of Belton has a population of only 3748 inhabitants,

is the City authorized by the Constitution to amend its home rule charter in any particular, and especially by providing for a managerial commission form of government.

"(2) It now being definitely determined that the City of Belton has a population of only 3,748 inhabitants, is the City authorized under the Constitution to provide in its charter for an ad valorem tax levy of Two Dollars and Fifty Cents (\$2.50) on each One Hundred Dollar (\$100.00) valuation, and if such amendment and provision were made in the City Charter, would such tax levy be valid?"

Section Five of Article Eleven of our State Constitution, under which it appears the City of Belton was chartered, provides:

"Cities having more than five thousand inhabitants may, by a majority vote of the qualified voters of said city at an election held for that purpose, adopt or amend their charter, subject to such limitations as may be prescribed by the Legislature . . . said cities may levy, assess, or collect such taxes as may be authorized by the law or by their charters,"

not to exceed two and one-half per cent of the taxable property of the city for any one year.

The real question, and a difficult one in this case, is whether or not the decrease in the population of the City of Belton to a number below five thousand automatically abolishes the city corporation, or has any effect upon its municipal powers. I have been unable to find any decision by a Texas court directly on this point, but it is my opinion that the City of Belton may continue under its original charter, the same being unquestionably legal at the time, and in the full exercise of all powers and privileges held by it under that charter until its corporate existence is abolished, or modified, in some manner provided by law. In other words, its corporate existence and powers have not been automatically destroyed, or diminished, by the decrease in its population.

"The State creates municipal corporations for public ends and purposes, and such a corporation can not dissolve by non-use of its corporate functions . . . but it must, and will, continue in existence until dissolved by legislative enactment, or in some other mode provided by law." Pence vs. Cobb, 155 S. W. 608, and cases cited on page 611, (5, 6).

When a city organizes under a certain class, it continues in that class, notwithstanding fluctuations in population which would place it either in a higher or lower class, until the changed classification is made in the manner prescribed by law. This proposition seems to be sustained, both by text book authorities and by the following cases:

Williams vs. Board of Trustees, 109 Pac. Rep. 482; Ex parte Fedderitz, 62 Pac. Rep. 935; Ex parte Mitchell 52, Pac. Rep. 799; Green, et al vs. Commonwealth (Ky.) 24 S. W. 610; Penve vs. Cobb, supra.

"In organizing under the general law, a city must accept the charter of its proper class; but, unless it elects otherwise, it retains its original charter, no matter to what class it may rise or fall by change in population." Ex parte Fedderitz, supra.

I think it evident that the adoption of the amendments desired by the City of Belton, and suggested in your letter, would not have the effect of changing the form, that is, the charter, of your city

government but that it would continue as a home rule government the same as when it was chartered. In order to change from an aldermanic to a commission form of government, it is not necessary for your city to take out or procure a new charter, but is done simply by amending its present charter in accordance with the provisions, of Article 1170, et seq. The same may be said of the proposed amendment to increase the tax limit from One Dollar and Ninety Cents (\$1.90) to Two Dollars and Fifty Cents (\$2.50).

By Article 1165, I construe the language, "cities having more than five thousand inhabitants may, by a majority vote of the qualified voters of said city at an election held for that purpose, adopt or *amend* their charter," and etc., means either cities which have not adopted the home rule amendment but which contain more than five thousand inhabitants, or cities which have adopted the home rule amendment legally, and at the time of such proposed amendment were still running under said charter.

The conclusion that a city of more than five thousand inhabitants once chartered as a home rule city will continue as such, regardless of fluctuations in its population, is borne out by the fact that neither the Constitution nor the Statutory law of this State takes any account of such fluctuations, or undertakes to give any effect to the same.

The authorities above cited hold that a city will continue in the class in which it is chartered until its corporate existence is altered or abolished by law, or in accordance with the law. In Article 1241, and succeeding Articles, is found what appears to be the only method by which an incorporated city, or town, may abolish its corporate existence. The law having prescribed a specific method, or procedure, for abolishing the corporate existence of a city, by a familiar rule of construction, that method is exclusive of all others. I would not contend, however, that the Legislature would not have the authority to prescribe other methods but only that the above is the only method which the Legislature has prescribed, and, in my opinion, is the only method or procedure under existing law by which the corporate existence of a city may be abolished.

It is persuasive of the above position that the validity of a municipal corporation can not be attacked collaterally. This has been held in *M. K. & T. Ry. Co. vs. Bratcher*, 118 S. W. 1091, citing *City of El Paso vs. Ruckman*, 92 Texas 86, *Graham vs. City of Greenville*, 67 Texas 62. In addition to this, a long line of Texas cases could be cited.

Answering your questions, I am of the opinion that the City of Belton is authorized to amend its home rule charter in any desired particular, even by providing for a managerial form of government, and also by increasing its present rate of taxation from One Dollar and Ninety Cents (\$1.90) to Two Dollars and Fifty Cents (\$2.50) on the One Hundred Dollar (\$100.00) valuation, which is the limit fixed by the Constitution.

Yours very truly,

F. O. MCKINSEY,
Assistant Attorney General.

Op. No. 2828.

CONSTITUTION—AMENDMENT, SECTION 5, OF ARTICLE 3, STATE CONSTITUTION, CONSTRUED.

1. Each House of the Legislature, by a four-fifths vote, may determine its own order of business.

2. Having legally adopted its order of business, bills or resolutions may be introduced in, or considered by, either House, in accordance therewith, not being restrained by said amendment.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, February 13, 1931.

Hon. Fred H. Minor, Speaker House of Representatives, Capitol.

DEAR SIR: Your communication of the 12th instant, addressed to the Hon. James V. Allred, Attorney General, has been duly received.

Your communication is as follows:

"At the general election held in November last, Section 5 of Article 3 of the State Constitution was amended as follows: (Here follows said amendment, which is copied below).

"Pursuant thereto, the House of Representatives, on the 21st day of January, as shown on page 102 of the House Journal, adopted by a vote of one hundred and thirty-three ayes and no noes, the following resolution:

"Whereas, at the general election on November 4, 1930, Section 5 of Article III of the Constitution of Texas was amended so as to hereafter read as follows, to-wit:

"The Legislature shall meet every two years at such time as may be provided by law and at other times when convened by the Governor. When convened in Regular Session, the first thirty days thereof shall be devoted to the introduction of bills and resolutions, acting upon emergency appropriations, passing upon the confirmation of the recess appointees of the Governor and such emergency matters as may be submitted by the Governor in special messages to the Legislature; provided that during the succeeding thirty days of the Regular Session of the Legislature the various committees of each house shall hold hearings to consider all bills and resolutions and other matters then pending; and such emergency matters as may be submitted by the Governor; provided further, that during the following sixty days the Legislature shall act upon such bills and resolutions as may be then pending and upon such emergency matters as may be submitted by the Governor in special messages to the Legislature, provided, however, either house may otherwise determine its order of business by an affirmative vote of four-fifths of its membership.'

"Whereas, under said amendment it is specifically provided that either house may otherwise determine its order of business by an affirmative vote of four-fifths of its membership; therefore, be it

"Resolved by the House of Representatives, by an affirmative vote of four-fifths of its members, That the order of business is hereby determined to be otherwise, and except as herein expressly provided the rules as printed in the Manual of the Forty-first Legislature, with the amendments thereto shown in the Journal, shall govern the procedure in the House and may be amended as therein provided.

"1. No bill shall be considered or tabled, unless it has been first referred to a committee, and reported therefrom. Bills and resolutions introduced during the first sixty days may be considered by committees and in the House and disposed of at any time during the session; provided, however, no bill or joint resolution shall be introduced after the first sixty days of a Regular Session of the Legislature, except by consent of a two-thirds vote of the House; and if so ordered by a two-thirds vote, such bill or joint resolution shall then be referred to a committee for consideration the same as other bills and joint resolutions. It is further provided that after the

first sixty days when a member desires to introduce a bill or joint resolution, he shall be allowed five minutes in which to explain the purposes of his bill, the vote then being taken without further debate.

"In view of the adoption of the foregoing resolution, the House of Representatives has heretofore not only permitted the introduction of bills, but committee hearings have been held during the first thirty day period, and some bills have been considered and passed by the House. The first thirty day period has now expired.. Under the procedure adopted by virtue of the foregoing resolution, I desire to submit the following questions, to-wit:

"(a) Can bills and resolutions be introduced in the House during the succeeding thirty days period without further action on the part of the membership?

"(b) Has the House acted legally and in conformity with the Constitution in permitting its committees to consider bills and resolutions during the first thirty days, and in passing upon the same on the floor of the House, in view of the adoption of the resolution hereinabove set forth?

"(c) Can the House legally consider and pass bills and resolutions during the succeeding thirty day period without further action upon the part of the membership, in view of the adoption of the resolution hereinabove set forth?

"(d) In view of the adoption of the resolution above herein set out, may bills and resolutions be introduced in the House and committee hearing held thereon after the expiration of the first sixty day period, where such bills or resolutions have been introduced by consent of a two-thirds vote of the House as in such resolution provided?"

It will be noted that the portion of said amendment pertinent to this inquiry falls into four sub-divisions, and these sub-divisions are printed separately and numbered, and the several sub-divisions are separated into sentences, so that they may be the more easily held in mind and comprehended.

1.

When convened in regular session, (a) the first thirty days thereof shall be devoted to the introduction of bills and resolutions; (b) acting upon emergency appropriations; (c) passing upon the confirmation of the recess appointees of the Governor; (d) and such emergency matters as may be submitted by the Governor in special messages to the Legislature.

2.

Provided that during the succeeding thirty days of the regular session of the Legislature, (a) the various committees of each house shall hold hearings to consider all bills and resolutions and other matters then pending; (b) and such emergency matters as may be submitted by the Governor.

3.

Provided further that during the following sixty days, (a) the Legislature shall act upon such bills and resolutions as may be then pending; (b) and upon such emergency matters as may be submitted by the Governor in special messages to the Legislature.

4.

Provided, however, either House may otherwise determine its order of business by an affirmative vote of four-fifths of its membership.

The first three of the above sub-divisions are clearly and plainly intended to provide an order of business or methods of procedure for the Legislature. The last proviso, which is set out as sub-division four above, clearly indicates that the Legislature, in framing said amendment, understood same to contain or provide merely an order of business, otherwise the provision that, "either House may otherwise determine its order of business, etc.," would be meaningless.

Again, it may be seriously questioned whether the language contained in said amendment, even without the final proviso, should be construed so as to confine the Legislature exclusively to the order of business set out in the amendment. This is especially true of the second and third sub-divisions, which cover the second thirty and the last sixty days of the session. The Legislature is not expressly forbidden to pursue an order of business different from that laid down in the amendment, and if forbidden at all, it would be merely by inference or implication and, save possibly in the first sub-division such inference or implication, in my mind, does not arise necessarily from the language used.

For instance, if the Legislature can do nothing during the second thirty-day period except the things prescribed, then both the Senate and the House, as bodies, can hold no sessions nor transact any kind of business, as such, because the amendment provides only that the committees of each House shall consider bills and resolutions and other pending matters and such emergency as may be submitted by the Governor. There is nothing named for the Legislature to do, unless the language is intended to mean that the Legislature, instead of the committees, is to consider emergency matters submitted by the Governor, which was probably meant to be said. A construction which brought about such a result would hardly be deemed reasonable, much less necessary. Standing alone, the language used to prescribe the order of business for the second thirty days is not such as to prevent the introduction and consideration of bills and resolutions in the House and we believe the same may be said of the rules of order prescribed for the last sixty days of the session.

Whatever effect may be given to the language used in the first three sub-divisions of said amendment, we are clearly of the opinion that the last proviso places beyond doubt or cavil the right of either House to "otherwise determine its order of business" by a four-fifths vote.

Provisos and exceptions are similar and are intended to restrain the preceding enacting clause or in some manner to modify it. The general intent of the enacting clause will be controlled by the particular intent subsequently expressed by proviso. 2 *Southerland's Statutory Construction*, Section 351; 50 *Corpus Juris*, page 834.

In the case of *Campbell, Receiver vs. Wiggins, Tax Collector*, our Supreme Court had under consideration the construction of a statute which in general terms exempted the property of the I. & G. N. Railway Company from taxation, but by proviso excepted certain property from said exemption. Speaking through Justice Gaines, the court gives the following as the effect of a proviso:

"Let it be admitted, for the sake of the argument, that the clause which

declares the exemption, if it stood alone, would embrace property acquired jointly by the two railroads, or even that acquired exclusively by the Great Northern. Which is to control—that clause or the proviso? The enacting clause directly points out what is to be exempt, but defines what is not exempted by implication only. The proviso goes further, and declares affirmatively that certain property shall not be exempt. In the language of Chief Justice Marshall: ‘The proviso is generally intended to restrain the enacting clause, and to except something which would otherwise have been within it.’ etc. *Wayman vs. Southard*, 10 Wheat., 30. ‘The general intent must be controlled by the particular intent subsequently expressed.’ *Suth. on Stat. Con.* The sole purpose of the proviso is to exclude from the operation of the exempting clause what might otherwise be construed to be within it, *and the meaning being clear, it must govern.*” (Underscoring mine.) 85 Texas, 424, 428.

To the same effect is the holding in the following cases:

Potter, et al vs. Robinson, Land Commissioner, 102 Texas, 448.

Galveston Co. vs. Gorman, 49 Texas, 287.

Quanah vs. White, 88 Texas, 14.

It may be contended that by using the mandatory term “shall,” in framing said amendment, the Legislature intended that the order of business so directed must be followed, and the mere fact that the final proviso was inserted might indicate this. This unquestionably would not prevent the proviso from having a controlling effect on the entire preceding provisions; the fact that the provisions were deemed mandatory might make a proviso necessary. If the language of the amendment is such as to make the order of business stated therein merely suggestive or permissible, then no proviso would be necessary. Whether said language was considered by the Legislature, which framed the amendment, as mandatory or merely permissive, the Legislature clearly intended to place the matter beyond question or doubt by adding the final proviso under discussion.

In the light of the foregoing, we will make categorical answer to your several questions as follows:

(a) “Can bills and resolutions be introduced in the House during the succeeding thirty day period without further action on the part of the membership? We answer, Yes.

(b) “Has the House acted legally and in conformity with the Constitution in permitting its committees to consider bills and resolutions during the first thirty days, and in passing upon the same on the floor of the House, in view of the adoption of the resolution hereinabove set forth? This question is answered, Yes.

(c) “Can the House legally consider and pass bills and resolutions during the succeeding thirty day period without further action upon the part of the membership, in view of the adoption of the resolution hereinabove set forth? If permitted by a two-thirds vote of the House, we answer Yes.

(d) “In view of the adoption of the resolution above herein set out, may bills and resolutions be introduced in the House and committee hearings held thereon after the expiration of the first sixty day period, where such bills or resolutions have been introduced by consent of a two-thirds vote of the House as in such resolution provided?” To this question we also answer, Yes.

It appears from the record, that the resolution whereby the House made and determined its own rules of order, was adopted unanimously. Thereby the House construed the amendment as giving to that

body the right to make its own rules of order if done by a four-fifths vote.

Under many decisions of our Supreme Court, the presumption obtains that the construction placed on a provision of the Constitution by the Legislature is correct and that it will be followed by the courts unless it is clearly wrong. It ought to strengthen that presumption in this case that there are several eminent lawyers among the membership of the House and that the resolution was adopted by more than the necessary four-fifths of the entire membership and without a dissenting vote of any member present.

With very great respect, I beg to be,

Yours very truly,

F. O. McKINSEY,
Assistant Attorney General.

Op. No. 2836

CONVICTS—STATUTORY CONSTRUCTION.

1. Construction of Acts of 1926, 39th Legislature, First Called Session, Chapter 13, Section 1.

2. Convicts who have been convicted of a felony since Chapter 13, First Called Session of the 39th Legislature became effective, are competent witnesses to testify in person for the State or the defendant in any criminal case in this State.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, March 23, 1931

Hon. Glenn R. Lewis, District Attorney, 51st Judicial District of Texas, San Angelo, Texas.

DEAR SIR: Your letter of the 17th instant, addressed to the Attorney General, enclosing a copy of your letter of same date to the Governor of Texas, has been handed to the undersigned for reply.

You desire an opinion from this department on whether a convict, who has been finally convicted of a felony in this State, would be a competent witness to testify in person for the State in a criminal case if he were out on a parole granted by the Governor.

From your letter we gather a number of facts pertaining to your instant case, but it is believed that the above constitutes a sufficient statement upon which an opinion as to his competency as a witness in a criminal case is based.

You are advised that it is the opinion of this department that a convict who has been finally convicted of a felony in this State since Chapter 13 of the Acts of the First Called Session of the 39th Legislature, commonly known as House Bill No. 300, became effective, is a competent witness to testify in person in any court in this State in a criminal case for the State or the defendant regardless of a parole from the Governor.

Since our opinion involves a construction of a statute, we take the liberty of quoting the act above referred to.

"An Act to amend Article 708 of the Code of Criminal Procedure, as amended by Chapter 27 of the Acts of the Regular Session of the 39th Legislature, by amending Subdivision 3 thereof so that persons convicted of felony may testify for the State and defendant, and declaring an emergency.

"Sec. 1. That Article 708 of the Code of Criminal Procedure shall hereafter read as follows:

"All persons are competent to testify in criminal cases except the following:

"1. Insane persons * * * (Not pertinent herein).

"2. Children * * * not able to understand the obligation of an oath * * * (Not pertinent herein).

"3. All persons who have been or may be convicted of a felony in the State, and who are confined in the penitentiary or any jail in this State shall be permitted to testify in person in any court for the State and the defendant as to any offense committed on a prison farm owned by the State or of which it is lessee or in any jail in the State, or on any railroad, train or highway along which prisoners are being transported under guard, and in all such cases compulsory process may issue for the attendance of all such witnesses when directed by the presiding judge, when, in his opinion, the ends of justice require their attendance. Providing further that the defendant may take the depositions of any such witnesses in the manner and form as in civil cases provided by law, and when so taken shall be admitted in evidence. Provided that the provisions of this Act shall apply only when the offense is committed on a prison farm owned by the State, or on which it is a lessee; or is committed in one of the prisons of the State; or, where it is committed on a railroad train; or a public highway along which prisoners are being transported under guard; or is committed in some jail.

"Sec. 2. There being no sound reason why a person convicted of a felony should not be permitted to testify, and the fact that the ends of justice are often defeated by virtue of such disqualification, creates an emergency and imperative public necessity which demands that the constitutional rule requiring bills to be read on three several days, be and it is hereby suspended, and this Act shall take effect and be in force from and after its passage, and it is so enacted."

This chapter became effective ninety days after the adjournment of said First Called Session.

Your attention is also called to Subdivision 3 of Article 708 of the Code of Criminal Procedure, which was passed at the Regular Sessions of the 39th Legislature in 1925, and which reads as follows:

"All persons who have been or may be convicted of felony in this State, and who are confined in the penitentiary, *shall not* be permitted to testify in person in any cause, for the State or for the defendant, but their deposition may be taken by the defendant as in other criminal cases provided by law."

You will notice that the first part of Section 1 of the Acts of 1926, above quoted, says:

"That Article 708 of the Code of Criminal Procedure shall hereafter read as follows:

"All persons are competent to testify in criminal cases except the following:"

This statute, of course, repealed or took the place of Article 708 of the Code of Criminal Procedure. Therefore, all persons are competent to testify in criminal cases except, and only except, the exceptions included in Subdivisions 1, 2 and 3, Section 1 of said act,

since there is no constitutional provision relating to the competency of witnesses. By a close study of subdivision 3, you will find that it does not specifically *except* any class of persons, as did Subdivision 3, Article 708, C. C. P., but on the contrary, specifically provides that convicts *shall be* permitted to testify in person in any court for the State or the defendant to any offense committed on a prison farm owned by the State or * * *. Therefore, the only way you could read in an exception in subdivision 3 to the general rule would be by implication.

We admit that as a rule in construing a statute it is not permissible, or to say the least, not good practice, to look to the caption unless the article, or a portion thereof is clearly ambiguous, vague or indefinite, but in this instance we feel thoroughly justified in taking into consideration the entire bill, and when you do, you will notice the last portion of the caption reads as follows:

"By amending Subdivision 3 thereof so that persons convicted of felony may testify for the State and defendant, and declaring an emergency."

Then turning to the language used in Section 2 of said bill, which reads in part as follows:

*"There being no sound reason why a person convicted of a felony should not be permitted to testify, and the fact that the ends of justice are often defeated by virtue of such disqualification, creates an emergency and imperative public necessity * * *."*

Evidently the Legislature intended in the 1926 Act to merely qualify the provisions of Subdivision 3 of Article 708, C. C. P. since it provided in substance that if a person was confined in the penitentiary at the time of the trial that he was not a competent witness, but we are unable to place such a construction upon it.

We especially invite your attention to the case of *Underwood vs. the State*, reported in 12 S. W., (2d) page 206, in an opinion written by Justice Lattimore. You will observe in this case that the court on motion for rehearing reversed and remanded the case and held specifically that that portion of Subdivision 3 of the 1926 Statute, which pertained to persons who had been finally convicted of a felony before the passage of said act was clearly unconstitutional.

The court in said case quoted and adopted the reasoning in the case of *the State vs. Grant*, 79 Mo., 113; 49 Am. Rep., 218. This case embodies a very interesting discussion on the constitutionality of the first part of said act, but it was not necessary for the court in the *Underwood* case to construe the entire article. The court held in said case that the Legislature could not pass any law restoring competence as a witness to any person who had been theretofore finally convicted of felony, basing it upon the ground that the incompetence of a witness could only be removed by a pardon issued by the Governor. The court said that the Legislature had no power to restore to any person the privilege of testifying as a witness

when such privilege had theretofore been lost to him by reason of final conviction of a felony.

In the Grant case, *supra*, the court said that:

“When the statutes annex certain disabilities, the loss of certain civil rights, to the conviction of a crime, and a conviction of that crime thereafter occurs, that thereupon by force and operation of the law and of the judgment of conviction the disabilities become welded to the crime, forming thereby an indivisible integer incapable of separation by any exertion of legislative power.”

The court said further that the pardoning power is vested by our Constitution alone in the Governor; that aside from the reversal of the judgment in a criminal cause, the only method of relief from the disabilities annexed to such judgment is by a full pardon of the offense; and that, while the crime itself remains unpardoned the disabilities annexed thereto will remain unaltered and unaffected by any legislative act.

Therefore, it is the opinion of this department, that any convict finally convicted of a felony in this State, since the Act of the First Called Session of the 39th Legislature, above quoted, became effective, is a competent witness to testify in person for the State or the defendant in any criminal case in this State.

We might add further that following the opinion of the Court of Criminal Appeals in the Underwood case, *supra*, a person finally convicted of a felony in this State, after Article 708, C. C. P., Acts of the General Session of the 39th Legislature became effective, and before the Act of the First Called Session of the 39th Legislature, above quoted, became effective, would be a competent witness to testify in person for the State or the defendant in a criminal case, provided, he was not incarcerated in the penitentiary at the time of trial. See *Alexander vs. The State*, 281 S. W., pages 852-3. Following the same line of reasoning, a person finally convicted of a felony in this State prior to the passage of Article 708 of the Code of Criminal Procedure (Acts of 1925) would not be a competent witness to testify in person unless he had been unconditionally pardoned by the Governor.

Yours very truly,

FRED UPCHURCH,
Assistant Attorney General.

Op. No. 2837

NEWSPAPERS—LEGAL NOTICES—REQUIREMENTS OF A STATUTE

Where a newspaper is published and circulated in a county, the publisher maintaining his business domicile therein, the newspaper is a “newspaper” contemplated by Article 7342, Revised Civil Statutes of 1925, though the actual *printing* of the newspaper is done in another county.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, March 25, 1931.

Honorable R. N. Smith, State Representative, Capitol, Austin, Texas.

DEAR MR. SMITH: This will acknowledge receipt of your request of March 14th in reference to publication of legal notices in certain newspapers. You refer to us for an opinion the following question contained in a letter addressed to you by the Honorable Pat J. McKenna. To quote from the letter:

"A peculiar situation exists in Wood County and we are taking this means of asking information on the Texas statutes which apply to it.

"In this county five newspapers are printed and published in the county while two others are circulated as county papers but are published outside of it.

"We wish an opinion on the wording of the statute applying to the publication of citations in delinquent tax suits, which specifically states that such publication must be in a newspaper published in the county, or if none, then in one in an adjoining county. Does this statute mean that the paper must be printed in the county or does it mean that such publication is legal if published in a paper simply entered at a county post office?"

The answer to the foregoing question propounded must be obtained from the construction placed on Article 7342 and Article 2039 of the Revised Civil Statutes of 1925. That portion of Article 7342 as applicable hereto reads as follows:

". . . which notice shall be signed by the clerk and shall be *published* in some newspaper *published* in said county one time a week for three consecutive weeks. If there is no newspaper *published* in the county, the notice may be given by *publication* in a paper in an adjoining county."

The provision of Article 2039 is practically the same, and reads as follows:

". . . Such citation shall contain a brief statement of the cause of action, and shall command the officer to summon the defendant by making *publication* of such citation in some newspaper *published* therein, but if not, then in the nearest county where a newspaper is *published*, once in each week for four consecutive weeks previous to the return day thereof."

We have called attention to Article 2039, and quoted a portion thereof, in order to compare the language used therein with the language used in Article 7342. It is noticeable that the Legislature has used the term "published" in each instance in providing for citation by publication. We must determine the meaning of the word "publish" in order to ascertain the intention of the Legislature in reference to these publications.

The word "publish" primarily means to make known what before was private, to put into circulation the idea of publicity, of circulation, of intended distribution. (United States vs. Williams, (3rd) Federal, 484.) Bouviers law Dictionary defines the word "publisher" as one who, by himself or his agent, makes a thing publicly known; one engaged in the circulation of books, pamphlets, or other papers.

The terms of the foregoing statutes are plain, unambiguous, and

explicit and, therefore, it is not necessary to go outside of the language used to search for a meaning which the words do not reasonably bear. The Supreme Court of the United States says

“The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language he has used. He is presumed to know the meaning of words and rules of grammar. . . .”

It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional. *United States vs. Goldinberg*, 168 U. S. 95.

The intention of the Legislature seems to be to require that the newspaper selected for the publication of legal notices be one published within the county, and that it be known as a newspaper of the county; and, in the alternative, makes a provision to take care of such publication of legal notices by allowing such notices to be published in some newspaper in an adjoining county if there be no newspaper within the county.

The writer has been unable to find any Texas cases passing directly on this question, and has, therefore, been compelled to resort to the decisions rendered by the courts of other states.

The case of *Bayer vs. Hoboken*, 44 N. J. L. 131, and quoted in 201 Pacific 111, is somewhat in point. The statute under consideration required the printing of a notice in a newspaper “printed and published” within the limits of a municipality. The newspaper in which the publication was made was *printed* altogether on presses in the City of New York, but was distributed in Hoboken. The Court held that the newspaper was “printed and published” as required by statute.

In the case of *Stanwood vs. Carson*, 147 Pacific 562, a similar statute to the one mentioned in the foregoing paragraph was before the Court for construction:

“The vital consideration being notice by publication, such publication is the publication contemplated by law with little or no regard paid to the mere place of *printing*, even when the word ‘printing’, coupled with ‘publication’, is embraced in the statutory requirement.” See *Hinchman vs. Barnes*, 85 Pacific 854.

In the case of *Nebraska Land Stock Growing and Investment Company vs. McKinley, et al*, 72 N. W. 357, the Court was considering the statute which required a notice to be published in a paper “*printed*” in the county.

“We do not think that the word ‘print’ was by the Legislature used in the specific and somewhat technical sense of designating the purely mechanical act of impressing characters upon the paper. The object of the statute was to give notice, and, if the Legislature had the distinction at all in view, it would not, for that purpose, have selected the place of printing, instead of that by publication. ‘Print’ is familiarly used in the sense of ‘publish’ and in that sense the word receives recognition in many, if not all, of the dictionaries and, in that sense, we are satisfied the Legislature used it.”

We take the position that where a newspaper is published and

circulated in a particular county, and where the publisher has his office in the county from which the paper is distributed, the newspaper is one contemplated by the provisions of Article 7342. In other words, the object to be accomplished is to place the public notices in a newspaper which would most likely convey the message to the particular community intended to be reached.

It is our understanding that there are five newspapers printed and published in your (Wood) county while two others are circulated as county papers, but are actually *printed* outside of the county. Of course, we are not familiar with all the facts in reference to the publishing of these papers and, therefore, decline to pass directly upon the question whether or not any of the papers mentioned would be qualified to accept the publication of legal notices, but state the general proposition that if these newspapers are characterized and known as "Wood County Papers," the publishers maintaining their business domiciles in Wood County, the papers actually being published and circulated within said county, the fact that the *actual printing* of the papers is performed in an adjoining county would not disqualify these papers from accepting such legal notices. The fact that the Legislature has stated that such notices must be published, and fails to mention anything in reference to the printing of the newspapers, it cannot be said that the actual printing of the paper must be performed within the boundaries of the county so long as the character of the paper is known and accepted as a newspaper of that particular county.

Therefore, it is the opinion of this Department, and you are so advised, that the actual printing of the newspapers in which these legal notices are placed is immaterial and should not be taken into consideration in determining the question as to whether or not the newspapers meet the requirements of the statute.

Very truly yours,

EVERETT F. JOHNSON,
Assistant Attorney General.

Op. No. 2839

ICE—MANUFACTURE AND SUPPLY OF ICE TO PUBLIC—"AFFECTED WITH THE PUBLIC INTEREST"—PUBLIC UTILITY.

1. The manufacture and supply of ice to the public is not a business "affected with the public interest" to the extent that its rates and/or service are subject to regulation.

OFFICES OF THE ATTORNEY GENERAL,

AUSTIN, TEXAS, March 30, 1931.

Honorable E. T. Wyatt, Committee on Common Carriers, House of Representatives, Austin, Texas.

DEAR SIR: Under date of March 27, you submitted a copy of House Bill No. 630 requesting an opinion of this department as to the constitutionality of this measure, should it become a law.

In order to pass upon the constitutionality of this bill, it is necessary to determine whether or not the ice business is "affected with the public interest" to such an extent that its rates and/or service may be regulated by law.

Clearly the bill would be unconstitutional in that it is in direct conflict with the "due process clause" of Amendments Five and Fourteen to the Constitution of the United States, unless it is found that the ice business is "affected with the public interest," which would then bring it within an exception to the terms of the above Amendments.

We quote the cogent part of Articles Five and Fourteen:

"Article Five. No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *."

"Article Fourteen. * * *; nor shall any state deprive any person of life, liberty, or property, without due process of law; * * *."

Although the question as to whether or not a particular business was "affected with the public interest" has been before the Supreme Court of the United States and courts of last resort of various states numbers of times, in no instance do we find a definition of that phrase in more than very general terms.

To illustrate the generality of this, we quote the language of Mr. Chief Justice Taft in the case of Wolff Company vs. Industrial Court, 262 U. S., 522:

"It is very difficult under the cases to lay down a working rule by which readily to determine when a business has become 'clothed with a public interest.' All business is subject to some kind of public regulation; but when the public becomes so peculiarly dependent upon a particular business that one engaging therein subjects himself to a more intimate public regulation is only to be determined by the process of exclusion and inclusion and to gradual establishment of a line of distinction.

"In a sense, the public is concerned about all lawful business because it contributes to the prosperity and well-being of the people. The public may suffer from high prices or strikes in many trades, but the expression 'clothed with a public interest' as applied to a public business means more than that the public welfare is affected by continuity of service or by the price at which a commodity is sold or a service rendered. The circumstances which clothe a particular kind of business with a public interest in the sense of *Munn vs. Illinois* and the other cases, must be such as to create a peculiarly close relation between the public and those engaged in it, and raise implications of an affirmative obligation on their part to be reasonable in dealing with the public.

Further light may be had on the question by quoting Mr. Justice Sutherland in the case of *Tyson and Brother—United Theatre Ticket Offices vs. Banton*, 273 U. S. 214:

"The power to regulate property, services or businesses can be invoked only under special circumstances; and it does not follow that because the power may exist to regulate in some particulars, it exists to regulate in others, or in all.

"The authority to regulate the conduct of a business or to require a license, comes from a branch of the police power which may be quite distinct from the power to fix prices. The latter ordinarily does not exist in respect to merely private property or business, but exists only where

the business or the property involved has become 'affected with a public interest' * * *.

"A business is not 'affected with a public interest' merely because it is large, or because the public is warranted in having a feeling of concern in respect to its maintenance. Nor is the interest meant such as arises from the mere fact that the public derives benefit, accommodation, ease or employment from the existence or operation of the business; and while the word has not always been limited as 'strictly denoting a right', that synonym more nearly than any other expresses the sense in which it is to be understood. * * *

"The significant requirement is that the property shall be devoted to a use.

"The public has an interest, which simply means, * * *, that it shall be devoted to a public use. Stated in another form a business or property, in order to be 'affected with a public interest', must be such or be so employed as to justify the conclusion that it has been *devoted* to a public use and its use thereby, in effect, *granted* to the public * * *."

Enough has been said to show that an effort to give a concrete definition to which all facts may be applied would be utterly futile.

The preparation of food is not "affected with the public interest," *Wolff Company vs. Industrial Court*, 262 U. S. 522. Theatres or places of public amusement are not "affected with the public interest," *Tyson and Brother—United Theatre Ticket Offices vs. Banton*, 273 U. S., 214. The business of an employment agency is not "affected with a public interest," *Ribnik vs. BeBride*, 277 U. S., 350. The milk business is not "affected with the public interest," *Fairmont Creamery Company vs. State of Minnesota*, 274 U. S., 506. The gasoline business is not "affected with the public interest," *Williams, et al vs. Standard Oil Company*, 278 U. S., 235.

The question is not altogether new in Texas, although it has been before the Courts but few times. In *Clint vs. Houston Ice and Brewing Company*, 169 S. W., 411, the Supreme Court of Texas, in an opinion denying a writ of error from the Court of Civil Appeals for the Fourth Supreme Judicial District by Mr. Chief Justice Brown, used this language:

"This application for writ of error is refused because it does not appear from the facts stated that the Ice and Gin Company of Harlingen was a public corporation * * *."

And again in *Van Valkenburgh vs. Ford*, 207 S. W., 405, exact page 414, the Court of Civil Appeals at Galveston, in the course of its opinion, made this holding:

"An ice company is a private corporation. It lacks the power of eminent domain and *the public has no regulatory interest in the business.*"

In the very recent case of *City of Denton, et al vs. Denton Home Ice Company*, the Commission of Appeals in an opinion approved by the Supreme Court, reported in 18 S. W. (2d), page 606, held, in effect, that ice was a public utility. This opinion was withdrawn by the Supreme Court, and a substitute opinion entered, with the same member of the Commission of Appeals writing the opinion, Mr. Justice Critz. *City of Denton vs. Denton Home Ice Company*, 27 S. W. (2d), 119. The opinion was withdrawn for the reason that

the Supreme Court was not satisfied with the holding of the Commission of Appeals that ice was a public utility, and to evidence that such was the reason for the substitute opinion, we quote the language of the opinion:

"In our original opinion we held, in effect, that ice was a public utility. On more mature consideration of the question here certified, we have reached the conclusion that it is not necessary to a decision of this case to decide whether ice is a public utility within a common acceptation or meaning of that term. We, therefore, withdraw our original opinion herein and substitute the following in its place: * * *".

The judgment of the Court could have been sustained in the original opinion on the ground that the ice business was a public utility. The Supreme Court having refused to permit the opinion to stand on that ground is very clear and striking evidence of the fact that had it been necessary to a proper decision of the case, the Court would have held that the ice business was not a public utility.

While, as stated above, the question as to whether or not the ice business is or is not a public utility "affected with the public interest" has not yet been before the Supreme Court of the United States, it will not be long before that Court will pass on the question. In the case of *New State Ice Company vs. Liebmann*, reported in 42 Federal Reporter. (2d), 913, the United States District Court for the Western District of Oklahoma on June 23, 1930, in an opinion by Judge Pollock, held that the ice business was not a public utility and was not "affected with the public interest" and was not, therefore, subject to regulation as to rates and/or service. The Legislature of the State of Oklahoma had enacted legislation like that proposed in House Bill No. 630 and this legislation was declared to be unconstitutional in that it was in conflict with the "due process clause" contained in Amendments Five and Fourteen to the Constitution of the United States. That case is now pending before the Circuit Court of Appeals of the United States, but no decision has yet been handed down by that Court.

We are familiar with *City of Tombstone vs. Macia*, an Arizona case reported in 46 L. R. A., 828; *Holton vs. Cammilla*, a Georgia case reported in 31 L. R. A., 116; *Bourland Ice Company vs. Franklin Utilities Company*, an Arkansas case reported in 22 S. W., (2d), 993; and *Oklahoma Light and Power Company vs. Corporation Commission*, an Oklahoma case reported in 220 Pac., 54. The first two cases above cited merely hold that the State may engage in any private business if the Legislature thinks the State's engagement in it will help the general public and is willing to pay the cost of the plant and incur the expense of operation. That, too, is the rule announced in *City of Denton vs. Denton Home Ice Company*, supra. These cases do not in any sense hold that the ice business is a public utility "affected with the public interest" to the extent that its rates and/or service may be regulated. That the State may go into private business, as held by the cases above cited, is, of course, sustained in the case of *Wolff Company vs. In-*

dustrial Court, *supra*, by the Supreme Court. In the Oklahoma case, the State Court held that the ice business was "affected with the public interest," but, as above shown, the United States District Court for the Western District of Oklahoma, in *New State Ice Company vs. Liebmann*, held expressly to the contrary. In the Arkansas case, the Supreme Court of that State passed on the constitutionality of a measure quite similar to House Bill No. 630 under consideration. The court held that portion of the bill which required a permit in order to establish a business to manufacture and supply ice to the public unconstitutional, and further declared that portion of the Act to be unconstitutional wherein the Utility Commission was authorized under certain circumstances, to permit competitive concerns to merge. While it is true the Supreme Court upheld the portion of the Act which permitted the Utility Commission to regulate prices and/or service, as above pointed out, it declared the law unconstitutional in that a permit to engage in the business was required and in that the Utility Commission was authorized to permit a merger of competitive concerns. This leaves but one authority sustaining the constitutionality of the proposed bill, being in the Oklahoma case and as above shown, and the United States District Court of the Western District of Oklahoma, subsequent to that decision, declared the identical law before the State Court to be unconstitutional.

As stated by Judge Pollock in *New States Ice Company vs. Liebmann*, *supra* :

"While the legislature of the state presently to be considered, relied upon by complainants, is a part of the anti-trust and anti-monopoly laws of the state, yet no person could hear and consider the proofs in these cases, as I did, and reach any conclusion but that such legislation in actual practice and operation tends of necessity to the creation and perpetuation of monopolies and to the destruction of all competition in the manufacture and sale of ice to consumers."

To say that the ice business is "affected with the public interest" would be, to use the language of Mr. Justice Bradley "running the public interest argument into the ground." Surely it cannot be said that the ice business is "affected with the public interest" when the Supreme Court of the United States has held that the milk business, the preparation of food, an employment agency and the gasoline business, as well as many other similar commodities are not "affected with the public interest."

Only today, the Honorable J. D. Moore, Judge of the 98th Judicial District Court of Travis County, Texas, in a suit styled *State of Texas vs. Gulf States Utilities Company*, decided that the ice business was not "affected with the public interest" to the extent that its rates and/or service were subject to regulation.

It is the opinion, therefore, of this department and you are advised that House Bill No. 630, if enacted into law, would be unconstitutional and void in that it would be in direct conflict with the "due process clause" of the Constitution of the United States as reflected in Amendments Five and Fourteen.

Inasmuch as we have reached the conclusion as above stated, we pretermit an opinion as to the constitutionality of this measure on any ground except that above stated.

Very respectfully yours,

EVERETT L. LOONEY,
Assistant Attorney General.
SIDNEY BENBOW,
Assistant Attorney General.

Op. No. 2846.

COMPETITIVE BIDS—AWARDING CONTRACTS.

1. The letting of contracts on competitive bids by the Board of Control involves judgment and discretion and the acts of the Board are not subject to the revision or control of the courts.

2. Board of Control has the right in the exercise of its discretion to reject the lowest bid for license plates and award the contract to one whose bid is higher.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, May 5, 1931.

Board of Control, Capitol.

GENTLEMEN: Your communication of the second instant, which you accompany by a letter addressed to you by the Highway Commission, dated May 1, 1931, has been referred to us for attention. Your letter and the letter of the Highway Commission to you are as follows:

“May 2, 1931.

“Hon James V. Allred, Attorney General of Texas, Capitol Station, Austin, Texas.

“Dear Sir: The Board of Control, on April 9, 1931, advertised for bids on number plates to be furnished the State Highway Department. The Board mailed out the specifications and requirements of bidders and received and opened the bids on April 30th. When the bids were tabulated, it was found that the Kittle Manufacturing Company, of Los Angeles, California, had bid \$104,578.50. The Gopher Stamp and Die Company, of St. Paul, bid \$106,205.55. The Kittle Manufacturing Company is low bidder by \$1,627.05. The bids were sent to the Highway Department for tabulation and recommendation before any attempt was made to award the contract.

“On May 1st, the Board of Control received the recommendation of the Highway Department calling our attention to the fact that inasmuch as the Highway Department and the Kittle Manufacturing Company are now engaged in litigation over a contract for road signs, that it would not be desirable to undertake to transact business with a company in which the State is engaged in a law suit, because of what the Highway Department believes to be a failure of the Kittle Manufacturing Company to furnish the State with the proper road signs under the contract.

“The Board of Control does not desire to force the Highway Department to enter into another contract with the Kittle Manufacturing Company because of the results of the road sign contract. Therefore, we beg to inquire of your department as to whether or not the State Board of Control has the authority to award the number plate contract to the Gopher Stamp and Die Company of St. Paul at the sum of \$106,205.55, rather than to the low bidder as above indicated.

"We are handing you herewith the proposal and bid of the two companies in question and will appreciate your early advice as to what proper and legal course the State Board of Control should follow in this matter.

"Thanking you for your prompt attention, we are,

Very truly yours,

STATE BOARD OF CONTROL,

By: Adrian Pool, Member.

Austin, Texas, May 1, 1931.

"State Board of Control, Austin, Texas.

"Gentlemen: Yesterday we were furnished with the tabulations of bids for number plates of the State Highway Department for the year 1932. From this tabulation we note that the lowest bidder on the license plates was the Kittle Manufacturing Company of Los Angeles, at \$104,578.50, and the next lowest bidder, the Gopher Stamp and Die Company, of St. Paul, at \$106,205.55. The difference between the lowest bid and the next lowest bid is \$1,627.05.

"We wish to call your attention to the fact that the Kittle Manufacturing Company is the concern that was awarded the contract for making our metal signs. They accepted this contract and gave bond for a three year guarantee against defects. Shortly after the signs were put up we noticed deterioration in quite a number and called the company's attention to them but we are unable to get any cooperation from them. The result has been that we have had to file suit against this company for defective signs.

"While we have, at all times, favored the awarding of contract to the lowest and best bidder, we are unable to recommend, in this case, that this business be given to the Kittle Manufacturing Company in view of our relations with them on the sign contract and we feel that it would not be desirable to enter into a contract with them since we are now engaged in litigation with this company, and we feel that they have not carried out their other contract with us. We, therefore, consider that the Gopher Stamp and Die Company is the best bidder under these circumstances, and with this statement submit the matter for your determination. If you take the same view that we do regarding the Kittle Manufacturing Company but find it desirable to re-advertise this business, taking bids only from responsible and reliable firms, we urge that this be done immediately by wire, as it is essential that this contract be entered into at an early date so that the plates may be delivered in time.

"Our attention has also been called to the fact that the Kittle Manufacturing Company did not submit a certified check with their bid but instead furnished bond. This is entirely out of accord with the proposal and requirements, and in our judgment, their bid should not have been received in view of this variance from the requirements.

Yours very truly,

(Signed) W. R. Ely, Chairman,
Highway Commission.
Cone Johnson, Member.
D. K. Martin, Member.

Gibb Gilchrist, State Highway Engineer."

The two communications state, in substance, that you advertised for bids for furnishing number plates for automobiles and chauffeur badges for the year 1932; that at least two bids were received; one from the Kittle Manufacturing Company of Los Angeles, California, for \$104,578.50; and another from the Gopher Stamp and Die Company of St. Paul, for \$106,205.55, the former bid being lower by \$1,627.05.

It is further stated that the Highway Department is involved, at present, in litigation with the lowest bidder named above, a suit having been brought against said Kittle Manufacturing Company by the

State for a large amount of damages, which the State claims and alleges it sustained by reason of said company's failure to furnish in accordance with its contract, highway signs; that the previous dealings of the department with said low bidder have been such as to make it undesirable to award the company a contract. You desire an opinion of this department as to whether you have the right to reject the low bid of Kittle Manufacturing Company and accept the higher bid of the Gopher Stamp and Die Company, it appearing that the latter company is, in all respects, a person desirable and proper to contract with.

The law under which the Board of Control operates authorizes the Board to advertise for bids on furnishing supplies of the kind in question. (Article 643, R. C. S.) The Statute nowhere requires the Board to accept the lowest bid, but by Article 646, provides:

"The Board shall in all cases reserve the right to reject or accept any or all bids or reject in part if it prefers, etc."

You have furnished us with a copy of the form used by the Board in advertising for bids, in which, accordingly, is inserted the following:

"RIGHT RESERVED TO REJECT BIDS.

The State Board of Control of Texas reserves the right to reject any and all bids."

It would seem from the above statute and from the provision of the proposal that you reserve the right to reject any bid or accept any bid; and those submitting bids did so with knowledge, or are charged with knowledge of this right; and hence, they are not in position to complain because of the acceptance of any bid submitted.

The matters of awarding contracts on competitive bids have elsewhere been fruitful sources of litigation, but not in Texas. The general rule has been laid down that in awarding a contract let on competitive bids the body or public official awarding same is required to exercise judgment and discretion, and such act will not be revised or controlled by the courts. 18 R. C. L. 236. In the case of King, et al vs. Guerra, 1 S. W. (2d) 373, in an opinion by the San Antonio Court of Civil Appeals, the rule is stated as follows:

"It is the settled general rule, in this as well as in other jurisdictions, that mandamus will not lie to control or review the exercise of the powers granted by law to 'any court, board or officer' when the act complained of calls for or involves the exercise of discretion upon the part of the tribunal or officer."

Many authorities are cited in support of this doctrine. In said opinion the following excerpt is taken from the case of Arberry vs. Beavers, 6 Texas 457:

"Mandamus * * * does not lie to instruct them (public officers) as to the manner in which they shall discharge a duty which involves the exercise of discretion or judgment."

In order to warrant a mandamus against a public official, it is necessary to show that such official acted through fraud or by a purely

arbitrary decision, and without reason. *King vs. Guerra*, supra, and cases cited.

Board of Commissioners vs. Davis, 141 Pac. 555, 556, is a fact case in point. A bridge was built under contract with a certain individual and by reason of faulty material used in its construction, the bridge fell down. The commissioners who represented the county in building the bridge then advertised for bids for the repair of the bridge and the same person who had been awarded the contract to build the bridge in the first instance was the lowest bidder under this proposal to repair. His bid was rejected and the contract to repair was awarded to another, the commissioners being dissatisfied with him or unwilling to award him another contract by reason of his failure to comply with the first one. The court held that the commissioners were justified in their act. In this connection the court laid down the rule that in selecting a bidder the award is not confined to the lowest bidder or the lowest responsible bidder, as the financial or pecuniary factor is not the only feature that enters into the choice. That in the discretion of those awarding contracts upon competitive bids every element that bears on the question may properly be taken into consideration, such as integrity of the bidder, his skill, ability and capacity to perform the particular work; and this rule seems to be followed almost universally. 18 R. C. L. Section 159; *West vs. City of Oakland*, 159 Pac. 202-4; *Ellington vs. Cherry Lake School District*, 212 N. W. 773-5, 55 N. D. 141; *People vs. Omen*, 290 Ill. 59; *Bridge vs. Ball*, 103 So. 236-7, 138 Miss. 508; *Chaffey vs. Crowley*, 190 N. W. 308, 49 N. D. 111; *Hibbs vs. Armesberg*, 119 A. 727-9, 275 Pa. 24.

We are clearly of the opinion that under the facts stated you have the right, in your discretion, to reject the bid of the Kittle Manufacturing Company, although it is the lower; and to award the contract, if you so desire, to Gopher Stamp and Die Company, although its bid is the higher than the lowest bid.

Yours very truly,

F. O. MCKINSEY,
Assistant Attorney General.
T. S. CHRISTOPHER,
Assistant Attorney General.

Op. No. 2847.

CONSTITUTIONAL LAW.

1. Amendments to Sections 5 and 24, adopted in November, 1930, construed as not limiting regular session to one hundred and twenty days.
2. Constitutional provisions relating to the same subject must be construed so as to give effect to all of them, if possible.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, May 4, 1931.

Honorable Fred H. Minor, Speaker, House of Representatives, Austin, Texas.

DEAR MR. MINOR: Receipt is acknowledged of your letter of May 2nd. reading in part as follows:

"Senate Joint Resolution No. 19, passed at the Regular Session of the Forty-First Legislature, proposed the following amendments to the State Constitution, to-wit:

"Section 1. That Section 5 of Article 3 of the Constitution of the State of Texas be amended so as to hereafter read as follows:

"The Legislature shall meet every two years at such time as may be provided by law and at other times when convened by the Governor. When convened in regular session, the first thirty days thereof shall be devoted to the introduction of bills and resolutions, acting upon emergency appropriations, passing upon the confirmation of recess appointees of the Governor and such emergency matters as may be submitted by the Governor in special messages to the Legislature; provided that during the succeeding thirty days of the regular session of the Legislature the various committees of each House shall hold hearings to consider all bills and resolutions and other matters then pending; and such emergency matters as may be submitted by the Governor; provided further that during the following sixty days the Legislature shall act upon such bills and resolutions as may be then pending and upon such emergency matters as may be submitted by the Governor in special messages to the Legislature; provided, however, either House may otherwise determine its order of business by an affirmative vote of four-fifths of its membership.

"Sec. 2. That Section 24 of Article 3 of the Constitution of the State of Texas be amended so as to hereafter read as follows:

"Members of the Legislature shall receive from the public Treasury a per diem of not exceeding \$10.00 per day for the first 120 days of each session and after that not exceeding \$5.00 per day for the remainder of the session.

"In addition to the per diem the members of each House shall be entitled to mileage in going to and returning from the seat of government, which mileage shall not exceed \$2.50 for every 25 miles, the distance to be computed by the nearest and most direct route of travel, from a table of distances prepared by the Comptroller to each county seat now or hereafter to be established; no member to be entitled to mileage for any extra session that may be called within one day after the adjournment of a regular or called session'.

"These amendments were duly adopted by a vote of the people on last November and the Forty-Second Legislature was organized in conformity with the Constitutional amendments thus adopted.

"On May 13th, 1931, the Legislature will have been in session for a period of one hundred and twenty days. Please advise whether the Legislature can extend the Regular Session beyond the expiration of the one hundred and twenty day period in the event it should be deemed necessary so to do in order to complete in a satisfactory manner the legislative program now pending."

Before the adoption of the amendment to Section 5 of Article 3 of the Constitution, set out in your letter, said section provided:

"The Legislature shall meet every two years at such time as may be provided by law and at other times when convened by the Governor."

The last quoted provision was brought forward in identical words in the amendment adopted by vote of the people in November, 1930. As amended, said section carried the additional provisions set out in your letter dealing with the order of business during a regular session.

There is no express limitation under the amendment as to the duration of a regular session. In the absence of such express limitation, it would necessarily have to be by implication. The amended section, however, merely prescribes the order of business for one hundred and twenty days of the regular session, and does not, thereby, limit such

session to that period of time. After prescribing what shall be done in the first thirty days, and the succeeding thirty days, it is then provided further that "during the *following* sixty days, the Legislature shall act upon such bills and resolutions as may be then pending," etc. It is to be noted that in referring to the third period, or division, of the one hundred and twenty days of the regular session the language, "the *following* sixty days," rather than "the *last* or *final* sixty days," is employed.

Section 24 of Article 3, prior to its amendment in November, 1930, provided for the compensation and mileage of members of the Legislature. That part of said section dealing with per diem read as follows:

"The members of the Legislature shall receive from the public treasury such compensation for their services as may from time to time be provided, but not exceeding five dollars per day for the *first* sixty days of each session; and *after that* not exceeding two dollars per day *for the remainder of the session*; except the first session held under this Constitution, when they may receive not exceeding five dollars per day for the *first* ninety days, and *after that* not exceeding two dollars per day *for the remainder of the session*."

Amended Section 24 of Article 3 covering this matter largely employs the identical language of said section before its amendment, the principal difference being only in the amount to be received per day. Clearly, the provision that the members of the Legislature shall receive not exceeding ten dollars per day for the "*first*" one hundred and twenty days of each session, and *after that* not exceeding five dollars per day *for the remainder of the session*," evidences an intention not to limit the regular session of the Legislature to one hundred and twenty days. If it had been intended to place such a limitation upon the regular session, it would have been unnecessary to make any provision for the pay "*for the remainder of the session*."

Special sessions are expressly limited to thirty days duration by the terms of Section 40 of Article 3 of the Constitution, reading in part as follows:

"... and no such session shall be of longer duration than thirty days."

Our courts have held that constitutional provisions relating to the same subject must be construed so as to give effect to all of them if possible. *City of San Antonio vs. Toepperwein*, 133 S. W. 416, 104 Tex. 43.

As stated heretofore, the provisions of Section 5, which you quote in your letter, relate solely to the order of business for the first one hundred and twenty days of the regular session. There seems to be no constitutionally prescribed order of business for the remainder of the regular session.

It is significant that the two sections amended were submitted in the same joint resolution to a vote of the people. Construing them

together, therefore, we are of the opinion that the regular session of the Legislature is not limited to one hundred and twenty days.

Very truly yours,

JAMES V. ALLRED,
Attorney General of Texas.

Op. No. 2848.

JURY FEE—COMMISSIONERS' COURT—AUTHORITY OF COMMISSIONERS' COURT OR TRIAL JUDGE TO REFUND AFTER PAYMENT BY CLERK TO COUNTY TREASURER.

1. The Commissioners' Court of a county has only such authority as is conferred upon it by the Constitution and laws of this State.
2. The Commissioners' Court of a county has no authority to refund a jury fee after such fee has been paid by the clerk of the court to the county treasurer.
3. The trial judge of a county or district court in which a jury fee has been paid, has no authority to enter an order authorizing the refund of the jury fee after the clerk of the court has paid same to the county treasurer, but may do so before the fee has been paid to the county treasurer.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, May 8, 1931.

*Honorable W. E. Yancy, County Auditor, Tarrant County,
Ft. Worth, Texas.*

DEAR SIR: The Attorney General is in receipt of your letter of May fourth which contains the following inquiries:

"When, if at all, is the Commissioners' Court authorized to refund jury fees to parties litigant after such fees have been paid over by the District Clerk to the County Treasurer?"

"Does the Trial Judge in the court in which the fee has been paid have any authority to make an order allowing the withdrawal of the jury fee deposit after the District Clerk has paid same to the County Treasurer; or is the Trial Judge's authority in this respect limited to an authorization of the withdrawal of the jury fee deposit while the same is in the hands of the Clerk of the Court and before it is paid over to the County Treasurer?"

(1). The County Commissioners' Courts in this State are created by the Constitution of 1876, (Article V, Sections 1 and 18). Their powers are limited and controlled by the Constitution and by the laws as passed by the Legislature. *Commissioners' Court of Madison County vs. Wallace*, 118 Tex., 279, 15 S. W. (2d), 535; *Bland vs. Orr*, 90 Tex., 492, 39 S. W., 558.

(2). Article 2124 of the 1925 Revised Civil Statutes of Texas reads as follows:

"No jury trial shall be had in any civil suit, unless an application therefor be made in open court, and a jury fee of five dollars if in the district court, and three dollars if in the county court, *be deposited by the applicant with the clerk to the use of the county.*"

Article 1617 of the Statutes reads, in part, as follows:

"Each district clerk, county clerk, county judge, county treasurer,

sheriff, district and county attorney, constable and justice of the peace, who shall collect or handle any money for the use of the county, shall make a full report to the commissioners court, at each regular term thereof, of all fines imposed and collected and all judgments rendered and collected for the use of the county, and all jury fees collected in their respective courts in favor of, or for the *use of the county*; . . .”

It will be noted that Article 2124 provides that the jury fee shall be deposited with the clerk to the use of the county and that Article 1617 provides that the various officials, who collect or handle any money for the use of the county, shall make full report to the Commissioners’ Court, at each regular term thereof, of all fines collected, judgments collected and jury fees collected. Article 1618 sets out the requirements of the reports required by Article 1617 and specifically requires that the report include the number of jury fees collected, the style and number of the case in which each jury fee was collected and from whom collected.

Article 1622 reads as follows:

“When any officer collects money beonging to, and for the use of, any county, he shall, except where otherwise provided in this title, forthwith report the same to the proper county clerk stating fully from whom collected, the amount collected, the time when collected, and by virtue of what authority or process collected. On making such report, such amount shall be charged to such officer, and he may discharge himself therefrom by producing the receipt of the proper county treasurer therefor.”

This article includes jury fees, for it is provided in Articles 2124 and 1617, above quoted, that the jury fee is “to the use of the county.”

Article 1709 provides that the county treasurer shall receive all moneys belonging to the county from whatever source they may be derived and shall pay and apply the same as required by law in such manner as *the Commissioners’ Court of his county* may require and direct.

Article 1626 provides that claims against a county shall be registered in three classes, those of the first class including jury script and script for feeding jurors, class number two, road and bridge script and class number three, all general indebtedness of the county. Article 1628 provides that the funds received by the county treasurer shall be classed as therein set out and shall be appropriated to the payment of all claims registered in the first, second and third classes, as defined in Article 1626. Article 1628 then provides that all jury fees shall be classed as class one. By its terms, all jury fees are appropriated for the payment of all first-class claims, which include those evidenced by jury script and script issued for feeding jurors. Article 1630 provides that the County Commissioners’ Court may transfer the money in hand from one fund to another with this exception, “except that funds which belong to the first class shall never be diverted from the payment of the claims registered in class first, unless there is an excess of such fees.” Under this Article, the Commissioners’ Court is authorized to transfer any statutory funds, such as jury fees, which are

wholly statutory, and are no part of a constitutional fund. *Carroll vs. Williams*, 109 Tex., 155, 202 S. W. 504. However, the Commissioners' Court is only authorized to make such transfers as are specifically enumerated, which includes transfers from one of the three funds there mentioned to another named fund.

It is apparent from the reading of the above mentioned statute that jury fees are collected, not as ordinary court costs, but as special funds which are to be deposited by the clerk with the county treasurer *to the use of the county*. The clerks are required to make a report thereof at each regular term of the Commissioners' Court. In this respect, the report required of the clerks is entirely different from that required by Articles 3896 and 3897, which deal with the ordinary fees of office. Once a jury fee has been paid by the clerk to the county treasurer, it becomes, under the express wording of the statutes, part of the county funds and goes into what is designated as class one, and is appropriated pro tanto to the payment of all first-class claims which are represented by jury script and script issued for feeding jurors. The County Commissioners' Court, acting under the authority granted to it by Article 1630, may, in the event there is an excess of funds of the first class, divert the balance of the funds of that class to payment of road and bridge script, or any general indebtedness of the county. Aside from this diversion of any excess funds which is permitted by Article 1630, the Commissioners' Court is entirely without power to appropriate these funds of the first class to any other purpose. The reimbursement of litigants is not one of the purposes for which general county funds may be paid. The enumeration in the statute of the express purposes for which funds may be transferred, necessarily, under a well settled rule of statutory construction in this State, excludes all other purposes. We, therefore, hold that, once a jury fee has been accounted for by the clerk and paid over to the county treasurer, it becomes a part of the county funds appropriated by law to funds of the first class and subject to change only as permitted by Article 1630, and not otherwise. In this connection, your attention is called to opinion No. 2662 by this department, appearing at page 390 of the Reports of the Attorney General, 1926-28, which opinion holds the Commissioners' Court has no authority to appropriate public money to a charitable organization managed and controlled by private individuals. That opinion is based upon the proposition that the Commissioners' Court has only such powers as are granted to it by the Constitution and Statute of the State. Your Commissioners' Court is, therefore, without authority or power, under the Constitution and laws of this State, to reimburse parties litigant by refunding to them the amounts which they have paid for jury fees.

(3) Article 2130 reads as follows:

"When one party has applied for a jury trial, he shall not be permitted to withdraw such application without the consent of the parties adversely interested. If so permitted, the court in its discretion may by an order permit him to withdraw also his jury fee deposit."

It is to be noted that this article permits the court to enter an order

authorizing the withdrawal of a jury fee deposit. As long as this jury fee deposit is in the hands of the clerk of the court, it is subject to the orders and control of the judge of that court, and under this article the court may order repayment of the same. This department does not construe this article as authorizing the judge of the court to order repayment of the jury fee if the same has been paid over to the county treasurer, for it has then become a part of the county funds and, under the express wording of Article 1628, has been thereby appropriated for the purpose of paying certain designated claims against the county. Article 2130 must be construed and read in the light of the general powers of a court and the constitutional and statutory control over the county finances. To hold that Article 2130 by implication permits the court to order repayment of a jury fee after the same has become a part of the county funds is to hold that a statute by implication substitutes the control of a district or county judge over county finances for that vested by express enactment in the Commissioners' Court. We do not think that it was the intention of the Legislature, in enacting Article 2130, to subject any part of the county funds to the control of a county judge or district judge, or to take control of said county funds out of the Commissioners' Court where it had, prior to that time, existed. We are sustained in its conclusion by the wording of Article 1709, which provides that the county treasurer shall pay out county funds, from whatever source derived, as the Commissioners' Court may require and direct.

Article 2130 refers to cases pending in both county and district courts and it would be a far-fetched conclusion to say that in those cases pending in a county court it was the intention of the Legislature to substitute the judgment of the county judge for the judgment of the entire Commissioners' Court, of which he is a member, insofar as regards the control of one of the special classes of county funds.

We, therefore, answer your second question in the negative, and hold that the trial judge, once the jury fee has been paid over by the clerk to the county treasurer, has no authority to enter an order authorizing the party depositing the fee to withdraw the same.

Yours very truly,

R. W. YARBOROUGH,
Assistant Attorney General.

Op. No. 2852.

UNIVERSITIES AND COLLEGES
FEES CHARGEABLE AT STATE INSTITUTIONS OF HIGHER LEARNING
CONSTRUCTION OF POLLARD FEE BILL
(CHAP. 237, LAWS 40TH LEG.

1. Senate Bill No. 202, Chap. 237, Laws of Fortieth Legislature of Texas, popularly called the Pollard Fee Bill, prohibits all compulsory charges at Texas State Institutions of Higher Education, except those specifically enumerated; and also prohibits the collection from any student of any voluntary payment for any educational service, except as permitted by the Act.

2. A medical or health service is not a strict educational service, but one of the ordinary expenses of living, and the Legislature having failed to provide for such service, the University may furnish same for a fee to those students who voluntarily subscribe therefor.

3. The Pollard Fee Bill permits the collection of fines for overdue library books and the deduction of the amount thereof from the library deposit, where a reasonable period of time for use free of fines is established.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, June 1, 1931.

*Dr. H. Y. Benedict, President, The University of Texas,
Austin, Texas.*

DEAR DR. BENEDICT: Under date of May 18th, you addressed a communication to Honorable James V. Allred, Attorney General, requesting an opinion concerning student fees chargeable at State Institutions of Higher Education. Since your question is best stated in your own language, we copy your letter as follows:

"Since the passage of Senate Bill 202, Chapter 237, Regular Session of the Fortieth Legislature (the so-called Pollard Fee Bill), The University of Texas Main University at Austin has been charging resident students as follows:

"A *registration fee* of \$30 per Long Session or \$15 per Semester; \$5 per Summer Term of six weeks;

"A *laboratory fee* of \$2 per course of three semester hours or less; \$4 per course of four semester hours or more;

"A *charge* for undue breakage and damage secured by a *deposit* of \$6 per laboratory course, returnable to the student less any assessments made during the semester, Long Session, or Summer Term;

"A *charge* for loss, undue damage, late return, etc., of library material available for student use secured by a *deposit* of \$6 per Long Session, Semester, or Summer Term, returnable to the student less any assessments made during the Long Session, Semester, or Summer Term.

"Upon the passage of the Act referred to, the University stopped charging (a) late registration, (b) add course, (c) section change, (d) record of work, (e) condition examination, (f) diploma, and (g) medical service fees. It continued to charge, perhaps in violation of the Act, a library fine of ten cents per day for keeping a book out over-time. This fine is taken from the student's \$6 deposit described immediately above.

"The average effect of the Pollard Bill was to cut the income from fees about 12½%, or \$25,000 a year at the Main University.

"Assuming that the Pollard Bill does not prohibit charges for cafeteria meals and dormitory occupancy or similar special services, I wish to have your opinion concerning the legality of the fees listed (a) through (g), above.

"I understand that your Office in previous years has given opinions on this subject to other State Institutions of Higher Education. The University of Texas has not hitherto asked for an opinion because it was following what was thought to be a very strict interpretation of the law (library fines excepted, in which case we could devise no other way of getting books back on time)."

We infer from your letter that you desire an opinion covering, in addition to those charges indicated by letter, the legality of the library fines as well.

The bill referred to reads as follows:

"Section 1. No State educational institution shall collect from the student thereof any tuition, fee or charge of any kind whatever except as

permitted by this Act, and no student shall be refused admission to or discharged from any such institution for the non-payment of any tuition, fee or charge except as permitted in this Act.

"Sec. 2. Any such educational institution may collect from each student a matriculation fee of not to exceed thirty (\$30) dollars for any term of nine months, and laboratory charges to cover actual laboratory materials and supplies used by such student not to exceed in any event four (4) dollars for any one year from any one student in any one laboratory course. Matriculation fees for any six weeks may not exceed five dollars, or for any ten weeks term, not to exceed ten dollars. Provided, however, said educational institutions may collect reasonable deposits from students each year to insure said institutions against losses, breakage, etc. in libraries and laboratories, said deposits to be returned at the end of each school year minus such damage, loss or breakage as may have been done by each individual student who has put up a deposit.

"Sec. 3. The words 'State educational institutions' as used in this Act shall include the following and any branch thereof: The University of Texas; the Agricultural and Mechanical College of Texas; the various State Teachers' Colleges of Texas; the College of Industrial Arts of Texas; the John Tarleton Agricultural College of Texas; the North Texas Agricultural College; the Prairie View State Normal and Industrial College; the Texas Technological College; and any other State educational institution either heretofore provided for or hereafter to be provided for under the laws of this State.

"Sec. 4. Nothing in this Act shall prevent the collection of fees or charges voluntarily paid by the students to cover the expense of student activities; provided, however, that the same shall never be made compulsory or required by the educational institution as a condition precedent to a student entering or continuing at said institution.

"Sec. 5. The fact that excessive fees and charges at our State educational institutions are being exacted which works a hardship on a great majority of the students, and this notwithstanding the fact that under our system of government and free institutions our schools should be as nearly free and without cost to the students as possible, creates____(here follows emergency clause)."

This Act became effective in the summer of 1927.

In construing a statute we are guided by general principles of statutory construction and by the rules laid down in the Texas Statutes Section 6 of Article 10, Revised Civil Statutes of 1925, reads as follows:

"In all interpretation, the court shall look diligently for the intention of the Legislature, keeping in view at all times the old law, the evil and the remedy."

It will be noted that the so-called Pollard Fee Bill applies to all State Institutions of Higher Education. Your inquiry pertains only to The University of Texas. The author of the bill is a well known ex-student of that University, and it is a well known fact that the Main University, because of geographical location and general importance, is the object of more legislative observation than any other State Educational Institution. Having these facts in mind, we will limit our observations, in considering the old law, the evil, and the remedy, as required by the above quoted statute, to conditions as they existed at the Main University at Austin.

I.

Prior to the passage of the Pollard Bill, the charge for admission to the University was regulated by Article 2587, of the 1925 Revised

Civil Statutes of Texas, which provided that the fee of admission to the University should never exceed thirty dollars (\$30.00), and that the University should be open without charge for tuition. It is a well known fact that certain fees charged prior to 1927, mentioned in your letter, were charged in addition to the thirty dollars (\$30.00) permitted by Article 2587, and it was openly charged and generally believed throughout the state that these extra charges were illegal and violative of the plain provisions of the article limiting the admission fee. The Pollard Fee Bill was the result of a growing demand throughout the state for a reduction in the cost of higher education. It was believed by many that the University was outgrowing the purpose of its founders, which was to place a higher education in reach of the poorest in the land. (Benedict's History of the University of Texas, pages III, 12, 21, 42, 120, 156, 200, 262, 286 and 369). The old law having proven inadequate, the Pollard Bill was the remedy offered for what was thought by many to be a growing evil in the University management. The resulting loss in revenue, mentioned in your letter, while regrettable from a revenue standpoint, is proof that the bill gave, in a measure at least, the relief desired by its sponsors.

The matriculation and laboratory fees now charged by the University are within the limit set by the Pollard Bill. The amount of the laboratory and library deposits required is left to the discretion of the University authorities, limited only by the restriction that it must be reasonable. What is a reasonable deposit must be established by your experience, and would be such a sum as would, in all except very unusual cases, protect the University from loss by damage, breakage, etc., in laboratories and library.

It will be noted that Section 1 of the Pollard Bill prohibits the collection from any student of any tuition, fee, or charge of any kind, except as permitted by that Act. The fees mentioned by you, and lettered (a) to (f) inclusive, are not permitted by that Act. They are such charges as were frequently condemned by those favoring the Pollard Bill. They are also charges for functions and services which are inseparable from and indispensable in any institution of higher learning. It is the opinion of this department that the action of the University in stopping the special charges for (a) late registration, (b) add course, (c) section change, (d) record of work, (e) conditional examination, and (f) diploma, was the correct procedure to be followed; and further, that those fees cannot be charged under the wording of the present Act.

II.

The status of the medical service fee is more difficult of determination, and, in our opinion, stands in a class separate and apart from the other fees mentioned. It is a special service, such as the furnishing of room and board, which is mentioned in your letter. Medical attention is not a charge and burden resting peculiarly on those seeking higher learning, but falls alike on every man, be he student or stevedore. All schools must have teachers, but a free or fee health service, though highly desirable, is not an indispensable part of a

a university. Such service is not, historically speaking, one of those adjuncts necessarily associated with an institution of higher learning. The first health or physician's fee charged at the Main University at Austin was in 1909, more than twenty-five years after the opening of the University. The University Catalogue of 1909-10, at page 38, provides that "a physician's fee of three dollars is required of all students." This same provision is contained in the Catalogue for 1910-11, while in the Catalogue for 1912-13 the fee was designated a "medical fee" and numerous medical benefits were outlined. Since that date a medical fee has been charged, up to the passage of the Pollard Fee Bill in 1927.

The Main University appropriation bill for the two year period beginning September 1st, 1929, and ending August 31st, 1931, makes no appropriation for a University medical or health service. (General Laws, 41st Legislature of the State of Texas, Second and Third Called Sessions, page 318 to 339). That fact must be taken into consideration in considering the legality of a medical fee charge. No legal duty rests on the University to furnish a health or medical service. The Legislature having made no provision for this service, the University is faced with the prospect of either abandoning it, paying for the same out of matriculation fees, or charging a special fee. Section 1 of the Pollard Bill prohibits a compulsory charge of any nature whatsoever, save and except those charges therein enumerated. No medical fee is enumerated. It will be noted that Section 1 provides that no state educational institution shall "collect" any tuition charge or fee "of any kind," except as by the Act permitted, and further that "no student shall be refused admission to or discharged from any such institution for the non-payment of any tuition, fee or charge except as permitted in this Act." Since this provision makes invalid any attempt to collect any compulsory fee of any kind or nature whatsoever, except as specified in the Act, payment of a medical fee charge, if legal at all, would be purely voluntary on the part of the student.

May the University offer certain medical services in return for a set charge or fee, leaving it entirely optional with the student as to whether or not he desires to pay the fee and receive the services? Section 4 of the Act being considered permits voluntary payment of fees or charges to cover the expense of student activities, and if the doctrine that the mention of one voluntary payment would necessarily exclude all others were applicable here, the voluntary medical fee would be illegal. Here again we must consider the "evil and the remedy," which the Legislature had in mind. It is common knowledge that a student activities fee, commonly called the "Blanket Tax," had been charged at the University for some years prior to the passage of the Pollard Bill, and that in recent years an attempt had been made to force payment of this fee, usually \$10.50, from all students. The complaint was made that students were being forced to pay for an expensive athletic department, and these complaints became statewide with the action of certain student leaders who had charge of the matter during the year preceeding the passage of the

Pollard Bill in attempting to force each student, on registration, to buy a blanket tax or sign a "pauper's pledge" to the effect that he was unable to do so. This was the evil sought to be corrected by Section 4 of the Pollard Bill, and we believe that that section should be construed as applying to that situation, and none other, either by inclusion or exclusion. If this section is to prohibit any other voluntary payment to the University by any student, then the University cannot serve meals at the cafeteria and collect therefor, though such meals are served at an actual saving to the student. Neither could it furnish dormitory rooms to students and collect therefor, arrange for geology encampments where extra charges are incurred, or sell publications from the University Press and collect from a student the price of the books sold to him. In our opinion none of these optional charges were intended to be affected by the Pollard Bill, for all were being made at that time. One, at least, (Breckenridge Hall dormitory charges) was abolished in the face of determined opposition on part of students and ex-students, including some sponsors of the Pollard Bill. The Pollard Bill refers to tuition fees, or charges for such services as are an historic and necessary part of a University of the first class. It refers, in reality, to tuition, but the authors found it necessary to make the language broad because of the prior construction placed on Article 2587 of the Revised Civil Statutes by the Board of Regents. The primary purpose of the Act is to lower the cost of higher education by preventing the collection of excessive tuition. It goes further and prevents the charging of special fees for special courses, though voluntarily paid, but in our opinion it does not prevent voluntary payments for living expenses in those cases where the University sees fit to offer such special or non-educational services. On a related point see an opinion of this department addressed to Honorable E. E. Davis, Dean of North Texas Agricultural College, dated April 12th, 1927, and reported at page 269, Attorney General's Reports 1926-28, which holds that a student may voluntarily purchase laboratory materials necessary for a course of instruction, the Legislature having provided for the course but having failed to provide for the materials. Since the Legislature has not provided for free health or medical service at the University; and such attention is not a special educational service or function, but is one of the ordinary necessities of life, we hold that the University may furnish health or medical service for students and charge a fee therefor, receipt of such service and payment of such fee being entirely optional on the part of the student.

III.

The status of the library fine of ten cents per day for keeping a book out overtime is governed by still other provisions of the Act. The third sentence in Section 2 provides that "said educational institution may collect reasonable deposits from students each year to insure said institutions against losses, breakage, *etc.* (italics ours). in libraries and laboratories, said deposits to be returned at the end of each school year minus such damage, loss or breakage as may have been done by each individual student who has put up a deposit."

A library deposit has been required at the University since 1888, and probably prior to that time. The Catalogues from 1888 to 1892 show that a five dollar deposit was required to pay for lost or injured books. The Catalogue for 1892-93 states for the first time that the deposit was "to pay fines assessed," in addition to loss from lost or injured books. This provision has been retained until the present day. There grew up a practice during the intervening period of retaining one dollar of the deposit (two dollars in the school of Law) to pay for worn out books and binding. As illustrative of this, see University Catalogues for 1905-06, 1913-14, 1918-19. Later a non-returnable fee of two dollars was charged for library service, and in addition thereto the regular library deposit to secure payment of fines, losses and damage was required. (Catalogue for 1925-26, page 65). At that time (1925-26) the fine for non-return of library books on the required date was five cents a day for each and every day any book was over due (Catalogue of 1925-26, page 36). The Legislature, in passing the Pollard Fee Bill, had before it the current charges at the University which included a library fee for use of the library in addition to the regular deposit. The Act provides for reasonable deposits to secure the University against "losses, breakage, etc." It was evidently the intention of the Legislature to prohibit any charge for use of the library, but as we construe the Act it does not prohibit reasonable regulations to secure the return of books, even though a reasonable fine be imposed for failure to return the books on the required date. Such fines are generally charged throughout the country, in public libraries as well as in those associated particularly with some educational institution. The expression "etc." used in the statute, and following immediately after the words "losses and breakage," must be taken to mean fines for late return of books for all the other specific charges which were levied against the library deposit, at the time of the passage of the Act, were specifically enumerated in the Act. Assuming that the Legislature had something in mind when it used the expression "etc.," it must have had in mind those charges against the library deposit then existing. It is true that the word "damage" is used later in the Act in lieu of "etc.," but we construe the words "etc." and "damage" to cover the fines theretofore charged, for the words "losses and breakage" are used in the Act and are sufficiently broad to insure against loss to the library from lost or injured books. As above stated, the only charges deductible at the time of the passage of the Act were for lost or injured books and fines for late return. These charges had been expressly enumerated in the University Catalogues for many years, and were necessarily considered by the Legislature at the time of the enactment of the Pollard Bill. They are still permissible charges. University of Texas Bulletin No. 3013 being the General Information Catalogue for 1930-31, shows that books may be kept for two weeks, except reference books much in demand (page 47). The fine of ten cents per day (then five cents, page 47) becomes due and payable only in event a book is kept beyond that time. The requirement is reasonable, and shows on its face that it is a fine for non-return, not a

charge for use of the book. So long as it retains its former character, we are of the opinion that it is not prohibited by the Pollard Fee Bill. The emergency clause of that Act recites that a hardship is being worked on a great majority of the students, but we believe that experience will show that those students least able to stand the fines will be seldom guilty of holding a book beyond the reasonable time now allowed. We are of the opinion that the fines as now charged against a student's library deposit for late returns of library books are not prohibited by the Act.

Trusting that this opinion covers the points about which you were in doubt, I am,

Yours very truly,

R. W. YARBOROUGH,
Assistant Attorney General.

Op. No. 2854.

ARRESTING WITHOUT WARRANT—SEARCH AND SEIZURE—EVIDENCE
ADMISSIBLE.

1. A peace officer may, without a warrant, arrest a person who is drunk or found in a state of intoxication in any public place.

2. An officer making a lawful arrest has the right to search the person arrested without obtaining a search warrant, since the right to search is incidental to a lawful arrest.

3. Where it is shown a person was searched by officers after a lawful arrest for drunkenness and a pistol removed from such person arrested, the evidence obtained as a result of the search is admissible against the person in a prosecution for unlawfully carrying a pistol.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, June 19, 1931.

Honorable W. L. Rea, County Attorney, Refugio, Texas.

DEAR SIR: The Attorney General is in receipt of your letter of June 9th, and it is evident from the facts stated that you desire to know:

1. Whether or not an officer has the authority to arrest, without a warrant, a person who is drunk in a public place.

2. Whether or not the officer making such arrest has the right to search the person arrested without first obtaining a search warrant.

3. Whether or not a pistol found on such person arrested, as a result of the search, can be made the basis of a prosecution for unlawfully carrying a pistol.

Answering the question as to the authority of an officer to arrest without a warrant a person who is drunk or in the state of intoxication in a public place, we direct your attention to Article 212, Code of Criminal Procedure, 1925, which practically answers the question within itself.

"A peace officer or any other person may, *without a warrant*, arrest an offender where the offense is committed in his presence or within his view, if the offense is classed as a felony, or as an *offense against the public peace*."

The question might arise whether or not a person who gets drunk in a public place or is found therein in a state of intoxication has committed an offense which may be classed as "an offense against the public peace."

Chapter 3, Title 9, Penal Code, 1925, enumerates those offenses which are classified as "offenses against the public peace" and contains within its enumeration Article 477 which reads as follows:

"Whoever shall get drunk or be found in a state of intoxication, in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars."

• The case of *Whatley vs. State*, 8 S. W. (2d) 174, is directly in point. The appellant was driving an automobile while under the influence of liquor and Mr. Justice Martin of the Court of Criminal Appeals used the following language on the question of the legality of the arrest:

"The appellant was committing both a felony and an 'offense against the public peace' either of which authorized his arrest without a warrant." (Art. 212, C. C. P.)

We believe that the question is well settled as to the authority of an officer to arrest without a warrant a person who is drunk in a public place and do not deem it necessary to prolong this communication on that particular phase of your inquiry. *Whatley vs. State*, supra; *People vs. State*, 296 S. W. 536.

In reply to your second question as to the right of an officer to search a person whom he has lawfully arrested, we find this question to have been before the Court of Criminal Appeals of this State on numerous occasions.

In the case of *Hawley vs. State* (107 Texas Criminal Report), the officers made an arrest for a violation of the speeding law. The court held this being true the officers were authorized to arrest without warrant and the search which followed the arrest was also lawful.

The Court of Criminal Appeals, speaking through Mr. Justice Lattimore, in the case of *Jackson vs. State*, 295 S. W. 619, stated:

"It was not the purpose of the legislature in passing the search and seizure law, to have such literal effect given to its provisions as would compel the courts to reject evidence of officers who search prisoners upon arrest . . . nor can we think it was ever intended by the legislature that an officer arresting a desperate character under a warrant must bring his prisoner to where he can get a search warrant before removing from the person of such prisoner pistols, knives or other weapons."

Mr. Justin Martin of the Court of Criminal Appeals, in *Davis vs. State*, 21 S. W. (2d) 509, used the following language:

"The right of arrest carries with it the right of a contemporaneous search of the person and under some circumstances of the place where the arrest occurs."

In the case of *Nuben vs. State*, 21 S. W. (2d) 1061, a person was arrested by officers for driving an automobile without lights on a public highway. The court held the arrest was legal and justified

and that the officers testimony that there was whiskey in the car was admissible in a liquor trial.

Therefore, we believe that it is well settled that incidental to a lawful arrest, an officer has the right to search the person of the individual arrested and seize any evidence tending to establish "crime" whether it be one for which the arrest was made or any other. Under all authorities one legally arrested may be legally searched. *Washington vs. State*, 107 Texas Criminal Reports, 214, 296 S. W. 512; *Sandoral vs. State*, 106 Tex. Crim. Rep. 468, 293 S. W. 168; *Paulk vs. State*, 106 Tex. Crim. Rep. 472, 293 S. W. 169; *Hawley vs State*, supra; *Coats vs. State*, 1 S. W. (2nd) 288; *Green vs. State*, 2 S. W. (2nd) 274; *Levine vs. State*, 4 S. W. (2nd) 553; *Berins vs. State*, 7 S. W. (2d) 532; *Hepworth vs. State*, 12 S. W. (2d) 1018.

It is, therefore, the advice of this department that an officer has the right to arrest and search without a warrant an offender against the public peace and it necessarily follows that evidence obtained as a result of such lawful acts would not be inadmissible on the ground that it was evidence unlawfully obtained in violation of the Constitution and laws of this State or of the United States.

Yours very truly,

EVERETT F. JOHNSON,
Assistant Attorney General.

Op. No. 2856.

UNIVERSITY OF TEXAS—STATE TREASURER IS TREASURER OF—
UNIVERSITY FUNDS, MANNER OF DEPOSIT.

1. The State Treasurer is the Treasurer of the University of Texas and the University management is required to deposit collections with him and is not authorized to maintain special bank accounts for deposit of large sums of money obtained from fees, grazing leases, etc., said special accounts being made without the knowledge and not subject to the control of the Treasurer.

2. The University management is not authorized to deposit securities of any kind belonging to the University, other than with the Treasurer.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, June 26, 1931.

*Honorable Moore Lynn, State Auditor, Capitol Building, Austin,
Texas.*

DEAR SIR: Your letter requesting an opinion of this department concerning the handling of funds belonging to the University of Texas has been received and referred to the writer for answer.

Your questions will be taken up and answered in the order in which asked, the first two questions being answered as one. Those two questions are as follows:

1. "Is the management of the University authorized by law to maintain a special bank account or bank accounts in which are deposited large sums of money from fees, interest, grazing rentals and other sources; and in which account or accounts large sums remain for considerable periods; the State Treasurer (who is the treasurer of the University) having no

knowledge of or control over such funds during the time they remain in the bank account or bank accounts?

2. "Is the management of the University authorized to deposit any funds of any kind other than with the State Treasurer?"

The two articles of the 1925 Revised Civil Statutes quoted by you are as follows: Article 2584 reads in part:

"The State Treasurer shall be the treasurer of the University."

Article 2594 reads as follows:

"Expenditures.—All expenditures may be made by the order of the Board of Regents, and the same shall be paid on warrants from the Comptroller based on vouchers approved by the chairman of the board or by some officer of the University designated by him in writing to the Comptroller, and countersigned by the secretary of the board, or by some other officer of the University designated by said secretary in writing to the Comptroller."

The quoted section of Art. 2584 was Section 12 of "An Act to establish the University of Texas," being Chapter 75 of the General Laws of the Regular Session of the Seventeenth Legislature, which was approved March 30, 1881. Section 19 of that same Act read as follows:

Sec. 19. "All expenditures shall be made by the order of the board of regents, and the same shall be paid on warrants of the comptroller, based on vouchers approved by the president and countersigned by the secretary."

This Section was amended by an Act of the Thirty-second Legislature, being Chapter 57 of the General Laws of the Regular Session thereof, which was approved March 13, 1911. The Amendatory Act of 1911 is now Article 2594 of the Civil Statutes, which is quoted in full above. The emergency clause of that Act states the purpose of the Amendment, "there is no adequate law providing for the approval of University vouchers." Considering the original wording of Section 19 of the Act of 1881, together with the Amendatory Act of 1911, in the light of the then established State Officers and Departments, we think it free from doubt that the Article refers to the State Comptroller of Public Accounts of the State of Texas, and not to the Comptroller of the University.

The law contemplates that the expenditures made by order of the Board of Regents shall be on warrants from the Comptroller (based on properly approved vouchers) directed to the State Treasurer, who shall countersign and pay same (Article 4371, Revised Civil Statutes of 1925.)

Article 4374 of the 1925 Revised Civil Statutes provides in part as follows:

"All moneys received by the Treasurer shall be kept in the safes and vaults of the Treasury."

Article 4388, as amended by Acts 1930, 41st Legislature, 5th called session, page 230, Chap. 73, paragraph 3, reads in part as follows:

"The State Treasurer shall receive daily from the head of each department, each of whom is specifically charged with the duty of making same

daily, a detailed list of all persons remitting money the status of which is undermined or which is awaiting the time when it can finally be taken into the Treasury together with the actual remittances which the Treasurer shall cash and place in his vaults or in legally authorized depository banks, if the necessity arises. The report from the General Land Office shall include all money for interest, principal and leases of school, university, asylum and other lands.

"All moneys received by the heads of departments, including fees of office, that are of determined status shall be deposited daily in the State Treasury on a deposit warrant within five days after the receipt of such moneys."

Bouvier's Law Dictionary (3rd Ed.) defines a treasurer as "an officer intrusted with the treasurer or money either of a private individual, a corporation, a company, or a State." The Sureme Court of this State has defined a treasurer as "An officer who receives the public money arising from taxes, duties or other sources of revenue, takes charge of it, and disburses it upon order made by the proper authority. Jones vs. Marrs, 114 Texas 62, 263 S. W. 570.

Since the State Treasurer is the treasurer of the University also, we are of the opinion, and you are so advised, that all University funds of whatever nature should be transmitted to the Treasurer upon collection. Bearing in mind the general rules of law applicable thereto, and the specific statutes quoted above, we are further of the opinion that the management of the University is not authorized by law to maintain a special bank account or bank accounts in which are deposited sums of money from fees, interest, grazing rentals, or any other sources. The treasurer of the University (The State Treasurer) is charged by law with the duty of receiving, accounting for, and paying out said funds. He cannot discharge that duty if deposits of money are made by the University management in bank or banks without his knowledge and not subject to his present control.

In response to your second inquiry you are advised that the management of the University is not authorized to deposit any funds of any kind other than with the State Treasurer.

Your third inquiry reads as follows:

3. "Is the management of the University authorized to deposit securities of any kind which come into the possession of the University, other than with the treasurer of the University?"

In our opinion all securities of any kind which come into the possession of the University should be deposited with the University treasurer, and deposits otherwise made are unauthorized. Our opinion is sustained, but the application thereof is modified, by the latter part of Section 3 of Senate Bill 283, General Laws of the Regular Session of the Forty-second Legislature (approved April 16, 1931) which reads as follows:

"Pending the construction of fire and burglary proof vaults in the Capitol Building, the Board of Regents of the University of Texas and the State Treasurer shall rent for the safe-keeping of University securities a fire and burglary proof vault; no University securities shall be handled at the vault except in the presence of a representative of the Board of Regents designated by the Board and the Treasurer of the State or a representative designated by him."

This language is plain and unambiguous: it refers to securities. The bill as a whole deals with the University Permanent Fund, and the word "securities" as used in this Act refers to those obligations which constitute a part of the University Permanent Fund. It is our opinion that the above quoted provision of Senate Bill 283 does not apply to current funds, which are required to be deposited with the Treasurer as pointed out in answer to your first two questions.

Yours very truly,

R. W. YARBOROUGH,
Assistant Attorney General.

Op. No. 2857.

SECONDHAND VEHICLES—TRANSFER—FEES—PENALTIES—RECORDING—
SENATE BILL No. 40.

1. Senate Bill No. 40 does not affect bills of sale given prior to time of taking effect of Senate Bill No. 40, as it would be beyond the power of the Legislature to pass any law which would be retroactive in its effect.

2. For a bill of sale to carry the title to an automobile, or other motor vehicle, such bill of sale must actually be signed by the vendor, unless such party signing has a specific power of attorney which should accompany the bill of sale and be recorded with it.

3. Tax collectors entitled to receive as their compensation for recording bills of sale and applications for transfer the fee provided to accompany such bills of sale and applications for transfer, to-wit, twenty-five cents.

4. Penalties apply to transfers executed after the effective date of Senate Bill No. 40, and the entire penalty of \$2.50 or \$5.00 must be remitted to the Highway Department on Monday of each week.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, May 8, 1931.

*Mr. L. G. Phares, Chief, Highway Patrol, State Highway Department,
Austin, Texas.*

DEAR MR. PHARES: This will acknowledge receipt of yours of April 14, together with previous inquiries relating to Senate Bill No. 40 passed by the present Legislature, which is an act to amend Articles 1434 and 1435 of the Penal Code of Texas. Your inquiries are stated below in the order in which they occur in your letter, the answer to each appearing immediately after its statement.

Articles 1434 and 1435, before their amendment, were as follows:

"Art. 1434. Second-hand motor vehicle—license fee receipt.

"Whoever acting for himself or another shall offer for trade or sale any second-hand motor vehicle in this State, without then and there having in his actual physical possession the Tax Collector's receipt for the license fee issued for the year that said vehicle is offered for sale or trade; or whoever shall sell or trade any such vehicle in this State without transferring by endorsement of the name of the person to whom said receipt was issued by the Tax Collector and by physical delivery of the Tax Collector's receipt for license fee for the year that the said sale or trade is made; or whoever acting for himself or another who shall buy or trade for any such vehicle in this State without demanding and receiving the Tax Collector's receipt for the license fee issued for said motor vehicle for the year that said vehicle is bought or traded for, shall be fined not

less than ten nor more than two thousand dollars, or be imprisoned in jail not more than one year, or both. (id.)

“Art. 1435. Second-hand motor vehicle.—Transfer.

“It shall be unlawful for any person whether acting for himself or as an employe or agent to sell, trade, or otherwise transfer any second-hand motor vehicle without delivering to the purchaser a bill of sale in duplicate, the form of which is prescribed in this article, one copy of which shall be retained by the transferee as evidence of title, and the other copy of which shall be filed by the transferee with the county tax collector as an application for transfer of license together with the lawful transfer fee of one dollar. The following form of transfer shall be subscribed before a Notary Public.

“STATE OF TEXAS
COUNTY OF _____

Know all men by these presents that the ownership of the following described motor vehicle is hereby transferred by the undersigned to _____ for and in consideration of _____ and other valuable consideration.

Seal No. _____ State License No. _____ Name and Model and Year made _____ Engine No. _____ Horse Power (A.L.A.M.) _____ Transferee’s name in full _____ Transferee’s correct address in full _____

Before me, the undersigned authority, personally appeared the vendor of the vehicle described above, and being duly sworn, deposes and upon oath states that the vehicle described is hereby transferred to the transferee named above.

Vendor.

Subscribed and sworn to before me this _____ day of _____, 19__.”

“Anyone who shall fail to comply with any provision of this article shall be fined not less than ten nor more than one hundred dollars. (Id.)”

The amendment to these articles, which is now the law of this State, is as follows:

“S. B. No. 40.

A BILL

To Be Entitled

An Act to amend Article 1434, Chapter 8, Title 17, Penal Code of Texas, 1925, as amended by Chapter 77, Acts of the First Called Session of the Fortieth Legislature and amending Article 1435, Chapter 8, Penal Code of Texas, 1925, and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

Section 1. That Article 1434, Chapter 8, Title 17 of the Penal Code of Texas, 1925, as amended by Chapter 77, Acts of the First Called Session of the Fortieth Legislature be, and the same is, hereby amended so as to hereafter read as follows:

“Article 1434. No person, acting for himself or another, shall sell, trade or otherwise transfer any used or second-hand vehicle required to be registered under the laws of this State unless and until said vehicle at the time of delivery has been duly registered in this State for the current year under the provisions of said laws; provided, however, that a dealer may demonstrate such motor vehicle for the purpose of sale, trade or transfer under a dealer’s license plate issued such dealer for demonstration purposes. Whoever, acting for himself or another, sells, trades or otherwise transfer any such vehicle shall deliver to the transferee at the time of delivery of the vehicle the license receipt issued by a Tax Collector of this State for the registration thereof for the current year and a bill of sale in triplicate. Whoever, acting for himself or another, sells, trades

or otherwise transfers any second-hand or used vehicle without delivering to the transferee at the time of delivery of the vehicle the license receipt issued therefor for the current year and a bill of sale thereto in triplicate as herein required shall be guilty of a misdemeanor and upon conviction shall be fined in any sum not exceeding Two Hundred (\$200) Dollars. A copy of such bill of sale may be required to be sent by such Collector to the Highway Department."

"Section 2. That Article 1435, Chapter 8, Title 17, of the Penal Code of Texas, 1925, be, and the same is, hereby amended so as to hereafter read as follows:

"Article 1435. One copy of the bill of sale required to be delivered to the transferee of a used or second-hand car under the terms of Article 1434, as amended by this Act, shall be retained by said transferee as evidence of title, and another copy shall be filed by the transferee within ten days from the date of the transfer with the County Tax Collector of the County in which the transferee resides as an application for transfer of license, together with a transfer fee of twenty-five cents; provided, that if said transferee does not file said application within said ten days, and before the expiration of twenty days, a penalty or fee of Two Dollars and fifty cents (\$2.50) shall be paid, and at the expiration of said twenty days a penalty or fee of Five (\$5.00) Dollars shall be paid upon the filing of such application, such penalty shall be collected upon each application filed by any transferee. Said penalties shall be remitted to the Highway Department on Monday of each week as chauffeur's fees are now required to be reported and remitted. The Tax Collector and his bondsmen shall be liable for the penalties herein provided in the event such penalties are not collected. Bills of sale and transfer applications shall be made out in triplicate. One copy shall be sent to the State Highway Department by the 25th of the succeeding month, as may be prescribed by said Department. The same shall be on the form prescribed by said Department, except that the following information shall be shown, as follows: 'State and County in which the same is executed.' 'That the ownership of the vehicle is transferred.' 'That said vehicle has been duly registered in the State for the current year.' 'Names and street addresses of the vendors and vendees.' 'Consideration.' 'State license number.' 'Engine number.' 'Name.' 'Model and year made.' The same shall be sworn to by the vendor.

"The Tax Collector and the Highway Department shall refer to the appropriate prosecuting attorneys, any false statements found in any bill of sale or any false certificate executed by any Notary Public or other officer.

"Any person who shall transfer a motor vehicle and execute the same wholly, or partly in blank, leaving out any information that is required to be given, and can be given, shall be guilty of a misdemeanor and shall be fined in any sum not exceeding Two Hundred (\$200.00) Dollars.

"Whoever violates any provision of this Section for which no specific penalty is fixed shall be guilty of a misdemeanor, and shall be fined in any sum not exceeding Two Hundred (\$200.00) Dollars.

"Section 3. All laws and parts of laws in conflict herewith are hereby repealed.

"Section 4. The fact that many automobiles have been stolen and the failure to file application for transfer timely, results in much confusion, and the inability, in many instances, to trace the thieves and determine ownership; the ambiguity of the present law; and the excessiveness of the filing fee under the present law, create an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended, and said rule is hereby suspended, and it is so enacted."

(1) "Does this new law affect bills of sale that have been given but not recorded prior to its enactment?"

In answer to the first question you are advised that Senate Bill No.

40 does not affect bills of sale that were given prior to the time of the taking effect of Senate Bill No. 40 as it would be beyond the power of the Legislature to pass any law which would be retroactive in its effect. The old law prescribed no time within which bills of sale were required to be recorded.

(2) "Dealers all over the country have a stock of used cars on hand which have not been transferred to the dealer. How is the tax collector to charge for these motor vehicles when one is sold when a dealer applies to register or transfer the vehicle? In other words, what should this charge be?"

In answer to your second question as to the amount of fee which should accompany a bill of sale and application for transfer, which bill of sale and application for transfer was executed prior to the taking effect of Senate Bill No. 40, you are advised that these bills of sale and applications for transfer should be accompanied by a fee of twenty-five cents as provided in the new law, and we would say further that persons tendering these bills of sale for record are not subject to the penalties prescribed in the new law.

(3) "Is it permissible for a dealer to sign the vendor's name to a bill of sale and sign it by-----Motor Company, or whatever the dealer's name might be, as, for instance, John Doe by Jones Motor Company, by-----, using the name of the person actually signing the bill of sale?"

Your third question is with reference to dealers making legal transfers of motor vehicles by signing the vendor's name by the person actually signing the same. You want to know whether or not it is permissible for a dealer to transfer the title to a car in this manner.

You are respectfully advised that this is not permissible. We know that this is done throughout the State, but we do not believe that it constitutes a lawful transfer or that such a bill of sale would carry with it the title to a motor vehicle. By reference to the emergency clauses of Senate Bill No. 40 you will find that it states:

"The fact that many automobiles have been stolen and the failure to file application for transfer timely, etc."

This, in our judgment, indicates that for a bill of sale to carry the title to an automobile, or other motor vehicle, such bill of sale must actually be signed by the vendor, and that if it is signed by other than the vendor, unless such party so signing has a specific power of attorney which should accompany the bill of sale and be recorded with it, that the bill of sale would not carry the legal title to such automobile or other vehicle. The use of those words in the emergency clause, to our minds, indicates that this was one of the very purposes which this law was enacted to meet, and if automobiles or other motor vehicles were permitted to be transferred upon bills of sale and applications for transfer such as you mention in your question number three, that it would defeat one of the very purposes for which this law was enacted.

(4) "What course should be pursued in cases where it is impossible for the buyer to get a transfer?"

On this question the statutes are silent. Each case would have to depend for its answer on the particular circumstances surrounding it.

(5) "What fee should the tax collector require for recording these transfers, especially in cases where the transfer fee of 25c would not be equivalent to the fee allowed the tax collector as provided for in Section 11, Chapter 88, General Laws, Second Called Session, 41st Legislature?"

This presents a rather difficult question, but it seems to us that the determination and solution of the problem must devolve upon the construction which has heretofore been placed upon the old law by the officers and departments of this State and such construction acquiesced in by the Legislature in their failing to change the construction and interpretation of the law when they enacted the provisions of Senate Bill No. 40. This conclusion is supported by the fact that the Legislature made specific disposition of the penalties provided in this bill, but made no disposition of the fees for recording the bill of sale and application for transfer. The only logical conclusion that this could lead to, in our opinion, would be that the Legislature intended to continue to acquiesce in the construction hitherto placed upon Section 11, supra, allowing tax collectors to receive a fee for recording these bills of sale.

Following this conclusion, you are advised that under the law as it now exists, tax collectors are entitled to receive as their compensation for recording bills of sale and applications for transfer the fee provided to accompany such bills of sale and applications for transfer, to-wit: twenty-five cents, and that they are entitled to no further compensation but that such compensation is to be received and accepted by them under the provisions of the law as it now exists, not only as full compensation for recording these transfers, but for the performance of such other duties and obligations as the new law may impose upon them.

(6) "General Allred recently advised us that it would not be necessary for a dealer to register a used motor vehicle in recording the transfer, if the transfer was given prior to the time Senate Bill No. 40 became effective. Would this same rule apply to any person other than a dealer?"

In answer to your inquiry number six, you are advised that the same rule would be applicable to all persons alike, whether dealers or not. In other words, Senate Bill No. 40 is not retroactive in its effect.

(7) "In cases where a tax collector records a transfer given prior to the time when Senate Bill No. 40 became effective without requiring the registration of the vehicle, what fee should the tax collector charge?"

In answer to question number seven, you are advised that where a tax collector records the transfer which was given prior to the time when Senate Bill No. 40, the provisions of which are quoted hereinabove, became effective, the collector should require a fee of twenty-five cents. This presents the same question as is presented in question number two already answered.

(8) "This bill provides that a bill of sale be given in triplicate. Should the transferee file two copies of the bill of sale with the tax col-

lector and should the tax collector forward one of these to this office, or should this be done by the transferee?"

In answer to your inquiry number eight, you are advised that the transferee of a motor vehicle should retain one copy of the bill of sale and application for transfer as evidence of his title to the car, or other motor vehicle, and should file two copies with the tax collector, one copy of which to be retained by the tax collector and the other copy forwarded by said collector to the Highway Department.

(9) "If the tax collector is to forward one copy of the bill of sale to this office, should it be forwarded on Monday of each week or should it be forwarded on the 25th day of the succeeding month?"

The tax collector, under the new law, would be required to forward one copy of the bill of sale and application for transfer to the Highway Department on or before the twenty-fifth day of the succeeding month.

(10) "Should the \$2.50 and \$5.00 penalties be collected after the expiration of ten or twenty days only on transfers dated since this bill became effective?"

In answer to the tenth question, you are advised that the penalties apply only to transfers executed after the effective date of Senate Bill No. 40.

(11) "In many cases bills of sale are being presented to tax collectors that were written six months or a year ago, only in duplicate. The party making the bill of sale cannot be located to get the third copy. What should be done in these cases?"

In answer to your eleventh question, you are advised that Senate Bill No. 40 is not retroactive in its effect. Under the old law, bills of sale and applications for transfer were required to be executed in duplicate only. It is not necessary that these bills of sale and application for transfer be executed in triplicate although they have not been presented for record. This additional burden could not be imposed upon transferees under the provisions of the new law.

We would like to suggest, as a matter of practical operation along this line, that it would be proper for the transferee to file his bill of sale and application for transfer with the tax collector, and that the transferee retain the copy and the tax collector retain the original, but make a certified copy of the original and forward the same to the Highway Department, under the requirements of the new law; that is, on or before the twenty-fifth day of the succeeding month.

(12) "In cases where the \$2.50 or \$5.00 penalty has to be collected, should the 25c fee spoken of be added to these amounts or is it included in these fees or penalties?"

In connection with your inquiry number twelve, it seems clear to us that the sums of two dollars fifty cents and five dollars, provided for delayed recording of bills of sale and applications for transfer are clearly penalties and are no part of the fee for recording. We would have to construe the words "or fee" following the word "penalty," both in reference to the two dollars and fifty cents and the

five dollars, as surplusage, the intention being apparently to provide a penalty and not a fee, the fee having been set at twenty-five cents.

This construction is further borne out in view of our construction as to the compensation of tax collectors when we consider that conclusion in connection with the following language in the amendment to Article 1435, which is as follows:

“Said penalties shall be remitted to the Highway Department on Monday of each week as chauffeur’s fees are now required to be reported and remitted.”

Under that language, the entire penalty of two dollars and fifty cents or five dollars, must be remitted to the Highway Department on Monday of each week, and in cases where the penalty was collected and required to be remitted to the Highway Department, the tax collector would, therefore, be entitled to receive no fee if the transfer fee were included in the sums of two dollars and fifty cents and five dollars.

You are advised, in answer to your inquiry number twelve, that the twenty-five cent transfer fee must accompany the bill of sale and application for transfer in addition to the two dollars and fifty cents or five dollars penalty, depending upon the date of filing.

Yours very truly,

T. S. CHRISTOPHER,
Assistant Attorney General.

Op. No. 2860.

WITNESSES—SUBPOENA—RE-ISSUANCE—AUTHORITY OF DISTRICT
JUDGE TO ORDER.

1. Under Articles 103, P. C., and 463, C. C. P., before clerk or deputy can issue subpoena in felony case, there must be a written application by the defendant, or his attorney, or the attorney for the state, and it is a penal offense for a clerk to issue such process without requiring written sworn application.

2. Since the passage of Senate bill No. 126, Gen. Laws, Reg. Session, Thirty-third Legislature in 1913, district judge has no authority to excuse witnesses and order clerk to issue additional subpoenas for same witnesses for later date during same term or for next term.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, June 29, 1931.

*Doctor J. W. E. H. Beck, Chairman, Senate Investigating Committee,
Senate Chamber, Austin, Texas.*

DEAR SIR: Receipt is acknowledged of your letter of June 26, 1931, reading in part as follows:

“In the examination of several of the sheriffs’ reports, we have discovered that there has been a great many duplicate charges. In other words, in one county particularly, that at each term of court the district judge excuses the witnesses and informs them that they will be again subpoenaed to appear as witnesses in certain cases for the next term of court, and this has been done in a number of instances, incurring a great

deal of unnecessary expense to the state. . . . I am writing this letter with the request that you let us have a written opinion, construing Article 103, Penal Code; also Articles 466 and 472 of the Code of Criminal Procedure. The main question before us is whether or not a district judge, under the law as it now is, has a right to order the clerk to have subpoenas re-issued to each term of court for the same witnesses in the same case."

Article 103, Penal Code of Texas, reads as follows:

"Before the clerk or his deputy shall be required or permitted to issue a subpoena in any felony case pending in any district or criminal district court of this State of which he is clerk or deputy, the defendant or his attorney or the State's attorney shall make written sworn application to such clerk of each witness desired. Such application shall state the name of each witness desired, the location and avocation, if known, and that the testimony of said witness is believed to be material to the State or the defense. As far as practicable such clerk shall include in one subpoena the names of all witnesses for the State and the defendant and such process shall show that the witnesses are summoned for the State or defendant. If any such clerk or his deputy shall issue any subpoena for any witness in a felony case without complying with this article, or shall issue an attachment without an order of court, he shall be fined not less than twenty-five nor more than two hundred dollars. (Acts 1889, p. 145; Acts 1st C. S. 1897, p. 5; Acts 1913, p. 319.)"

Article 463, Code of Criminal Procedure (before its amendment, H. B. 550, Acts Forty-second Legislature, Regular Session, 1931, Rays Session Laws, p. 150), embodied almost the exact words of Article 103, P. C., supra. The only distinction is that no penalty is provided in Article 463, C. C. P., as punishment against a clerk or deputy issuing a subpoena without complying with said article; and, in addition, Article 463, C. C. P., contains the following stipulation:

". . . When a witness has been served with process by one party, it shall inure to the benefit of the opposite party in case he should need said witness."

It will be observed at the very outset that none of the provisions of either article of the Penal Code or the Code of Criminal Procedure provide for the issuance of a subpoena for a witness upon the order of a district judge. The only authority under said articles for the clerk to issue such subpoenas is that there shall first be a written sworn application by the defendant or his attorney or by the state's attorney, which application shall contain certain definite information.

Prior to the regular session of the Legislature in 1913, the district clerk was authorized to issue "*additional process*" upon the order of the presiding judge. (Acts 1899, p. 145; Article 1577, Branch's Ann Penal Code). This article read as follows:

"It shall be unlawful for the clerk of any district court, *after a witness in a felony case has been served with a subpoena* or an attachment, to issue any other or further process for said witness, except upon the order of the presiding judge, *made upon application to him for that purpose*. When a witness has been served with process by one party, it shall inure to the benefit of the opposite party in case he should need said witness, and as far as practicable the clerk shall include in one process the names of all witnesses for the state and defendant, and such process shall show that the witnesses are summoned for the State and defendant. Any dis-

strict clerk who shall violate the provisions of this law shall be deemed guilty of a misdemeanor and punished by a fine of not less than ten nor more than one hundred dollars."

By an act of the Legislature in 1897, first special session, p. 5, (Art. 114 P. C. 1911), it was provided, in connection with the above article, that:

"Any district clerk who shall issue any attachment or subpoena for any witness, except upon an order of court or upon the written application, signed and sworn to by the defendant or state's counsel, stating that such witness is believed to be a material witness, shall be deemed guilty of a misdemeanor, and, upon conviction, fined in any sum not less than twenty-five dollars and not more than five hundred dollars."

The above articles were amended in 1913, (Senate Bill No. 126, Chapter 150, General Laws, Regular Session, Thirty-third Legislature, p. 319), and the authority of the clerk to issue "process" upon the order of the presiding judge was omitted. This act of the Thirty-third Legislature in 1913 is now substantially embodied in the provisions of Article 103, P. C., and Article 463, C. C. P., as above set out, with reference to written application, under oath, containing specific information.

Even under Article 1577, before amendment, however, the clerk had no authority to issue a subpoena *originally* upon the order of the presiding judge, but could only issue "*additional process*," AFTER A WITNESS IN A FELONY CASE HAD BEEN SERVED, and then UPON THE ORDER OF THE PRESIDING JUDGE MADE UPON APPLICATION TO *HIM* FOR THAT PURPOSE. The strictest procedure was thus demanded in order to authorize the clerk to issue process at all. The trial judge, even prior to the amendment of 1913, seemed not to have the power, of his own motion, to order the clerk to issue a subpoena; such order was only to be made by him AFTER APPLICATION MADE TO HIM FOR THAT PURPOSE. Then, as now, a subpoena could only be issued after sworn application by the defendant, or his attorney, or the attorney for the state.

The right of compulsory attendance of witnesses is of the Constitution, but the statutes are plain in their requirements to secure the attendance of such witnesses; and one accused of crime who fails to follow their directions must abide the consequences. *Bedford vs. State*, 238 S. W 224. After compliance with the provisions of the Penal Code and Code of Criminal Procedure, *supra*, by an accused, or by counsel for the state or defendant, the duty immediately devolves upon the district clerk to issue a subpoena for the witness named and to deliver the same to the sheriff for execution. Once the witness has been duly summoned by the proper officer, he is required by law to be in attendance upon the court at the stated time, or on the day set apart for taking up the criminal docket, or any day subsequent thereto.

It is provided by Article 3707, Revised Civil Statutes of 1925, that:

"Every witness summoned in any suit shall attend the court from day to day and from term to term, until discharged by the court or party summoning him."

While the above statute has not been expressly adopted as a part of the Penal Code or Code of Criminal Procedure, yet it clearly applies to criminal, as well as civil, cases in so far as possible. *Jones vs State*, 265 S. W. 577. As a matter of fact, all subpoenas issued in felony cases in all the district courts of this state have adopted the provisions, in part, of Article 3707, *supra*, and require the witness not only to be in attendance upon the court at the stated time, but to "there remain from day to day and from term to term until discharged."

In the event a witness has been duly summoned and fails to appear, he is subject to a fine at the discretion of the court, Articles 465 and 481, C. C. P.; likewise, an attachment may issue upon the application of the state or the defendant to secure the attendance of such witness, Articles 472 and 481, C. C. P. Moreover, there is no doubt but that a district judge has authority, once a witness has been duly subpoenaed or has made his appearance before the court upon the trial of a case, to order said witness to remain in attendance upon the court from day to day and from term to term, or to return for attendance upon the court at any future date or term; and such district judge would have the power, in addition to the authority given under Articles 465 and 481, *supra*, to punish such witness for contempt in the event of his failure to comply with such order.

No provision is made anywhere in the law for the re-issuance of a "*subpoena*" for a witness who has refused or failed to appear; on the contrary, it is expressly provided that an attachment may issue in such event. This is probably based upon the very elementary proposition that a witness, who fails to obey one subpoena, will just as likely disregard another. Since, under the law, a witness who has once been legally summoned in a case is required to not only appear at a given time but also to "attend the court from day to day and from term to term until discharged," there would be no occasion for issuing another subpoena for such witness, and, therefore, no occasion for authorizing the trial court to order the re-issuance of a subpoena.

It is probable that a district judge would have the authority to excuse a witness from attendance upon the court either temporarily or permanently; but he could not, of course, deprive a party of his constitutional right to have his witnesses present by an arbitrary exercise of this authority. If the court does exercise such authority, however, he is given no power under the law to order the clerk to re-issue subpoenas for such witnesses as he may have excused. To so hold would, in effect, mean that a district judge has the power to command a clerk of his court to do an illegal thing and to commit a penal offense, since the issuance of subpoenas must be based upon a compliance with the provisions of the Penal Code and Code of Criminal procedure.

An intention is clearly evident throughout the provisions of both civil and criminal statutes to avoid a duplication of process and consequent accumulation of costs. In *Searcy vs. State*, 40th Tex. Crim. Rep. 460, 50 S. W. 699, the Court of Criminal Appeals, in discussing the old act of 1899 authorizing the issuance of "additional process"

upon the order of the district judge after application made to him and providing that when a witness has been served with process by one party it shall inure to the benefit of the opposite party, etc., said:

“Referring to the law of the Twenty-first Legislature, which is Article 1012, P. C., it will be seen that the purpose of the enactment was to prevent accumulation of costs against the state in felony cases.”

This intention on the part of the Legislature to prevent the accumulation of costs against the state in felony cases is more clearly manifested in the subsequent enactment hereinabove discussed. As pointed out, the authority of the clerk to issue “additional process,” even upon the order of the court, has been taken away, and a district clerk or his deputy is no longer granted immunity from prosecution because he acted upon the order of the district judge.

In the case presented to us, the district judge excuses all the witnesses in a felony case and informs them at the time that they will be again subpoenaed to appear as witnesses in the same case for the next term of court. Thereafter he orders the clerk to issue subpoenas for the same witnesses in the same cases. There not only appears to be a lack of authority on the part of the district judge to make such orders, but an absolute lack of necessity therefor. Such orders are in apparent disregard of the evident intention of the Legislature to keep down unnecessary expense, and might result in the indictment of district clerks or their deputies acting thereunder.

In addition to this, it is our opinion that even if authority existed for a district judge to enter such orders it would be opposed to public policy and the best interests of the state. It is a recognized fact that trials of criminal cases in some of our district courts are too long delayed, many times due to the absence of witnesses. The experience of any district judge, or any practicing lawyer, in a very short time can not but bring home to him knowledge of the fact that witnesses in criminal cases can be more readily located and served with process within a short time after the commission of the crime, than if the case is drawn out through several terms of court.

If a district judge excuses witnesses already subpoenaed and already in attendance upon the court, it, of course, results in both the state and the defendant running the risk of such witnesses moving away or absenting themselves so that they may never be located again. At the same time that a district judge can inform witnesses that they are excused and will be re-summoned for the next term of court, he can just as easily order them to hold themselves in readiness and to keep in touch with the attorneys or parties and be in attendance upon the court at the next term, or when the case is called for trial again. Many of our able district judges have followed this practice throughout the years, and other who have not can be of great service to their state if they will adopt it, and carry out the spirit, as well as the letter, of the law.

You are advised, therefore, that, in the opinion of this department, a district judge has no power to excuse the witnesses in a criminal case and tell them that they will be re-subpoenaed for the next term

of court; and to thereafter instruct the clerk to issue new subpoenas for the same witnesses in the same case. A district clerk could not lawfully issue new subpoenas based upon such an order.

Very truly yours,

JAMES V. ALLRED,
Attorney General of Texas.

Op. No. 2879.

TEXAS NATIONAL GUARD—ARMED FORCES OF THE UNITED STATES—
ENTRANCE FEES AT UNIVERSITY OF TEXAS—EX-SERVICE MEN.

1. The term "armed forces of the United States," as used in Chapter 147, General Laws 38th Legislature, Regular Session, does not include a member of the Texas Cavalry or Texas National Guard who was never mustered into the service of the United States.

2. One who served in the Texas National Guard during the World War but who was never mustered into Federal service is not exempted by Chapter 147, General Laws, Regular Session, 38th Legislature, from payment of entrance fees at state educational institutions.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, March 22, 1932.

Dr. H. Y. Benedict, President of the University of Texas, Austin, Texas.

DEAR DR. BENEDICT: Your letter of recent date, addressed to Honorable James V. Allred, Attorney General, and requesting an opinion construing Chapter 147 of General Laws 38th Legislature, Regular Session, has been received and referred to the writer for answer. Your inquiry reads as follows:

"I respectfully request your opinion regarding Chapter 147 of the Acts of the 38th Legislature, Regular Session (page 316, General Laws.)

"Does this Act direct The University of Texas to exempt from the payment of fees when matriculating men who served in the Texas Cavalry in the Summer of 1918, but who were not mustered into the U. S. Army or Navy during the World War?

"Does this Act direct the return of fees already paid by such men, when matriculating after the passage of the Act?

"The particular case that has given rise to these general questions is that of a student of the University who has already paid without protest, so far as I know, his fees for the Sessions of 1928-29, 1929-30 and the current, 1931-32, one. This student was in Troop B, 6th Texas Cavalry, from June 1 to June 20, 1918, at which time he was rejected on account of being under age."

The pertinent provisions of the Act under consideration reads as follows:

"Section 1. The regents, trustees or other administrative officers or authorities of the public educational institutions of this State, who are vested with the authority to fix or collect fees and other charges in such institutions are hereby authorized and directed to except and exempt all citizens of Texas, who served during the late war in the armed forces or as nurses of the United States and were honorably discharged therefrom, and who are not entitled to receive such benefits under the Act of Congress known as the Vocational Rehabilitation Act, and who may desire

to receive or continue their education in said institutions, from the payment of all dues, fees and charges whatsoever, including fees for correspondence courses, except the cost of board and clothing; * * * and provided, further, that every applicant for the benefit of the said exemption shall submit evidence satisfactory to said regents, trustees, or other officers or authorities that the applicant is a citizen of Texas, served the United States as aforesaid and was honorably discharged from said service." (p. 316, General Laws, 38th Legislature, Regular Session.)

It will be noted that the service rewarded is service during the late war with Germany in the "armed forces of the United States." We are called upon to decide whether or not service in the Texas National Guard during the period of the war by one who was never mustered into the service of the United States constitutes service in the armed forces of the United States. In determining this it is important to bear in mind the dual nature of American citizenship, with the resulting decentralization of power so important to the preservation of a democratic government.

The State of Texas, as well as the Federal Union, has its armed forces. The term "militia" is an old one and was well known and used in the Colonies before the American Revolution. *Alabama Great Southern Railroad Co. vs. United States*, 49 Ct. Claims 532. It was upon that historical background that the provisions dealing with the "army" and the "militia" were inserted into the Constitution of the United States. Article 1, Section 8 of that instrument provides that the Congress shall have power "to raise and support armies;" "to provide and maintain a navy;" "to make rules for the government and regulation of the land and naval forces;" "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;" "to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states, respectively, the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress;" and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." Article 1, Section 10, provides that "no state shall, without the consent of Congress, keep troops, or ships of war, in time of peace."

Article 2, Section 2 of the Federal Constitution, provides that "the president shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states when called into the actual service of the United States."

The second amendment to that constitution (Article II of the Bill of Rights) provides that "A well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed."

The Supreme Court of the United States, in the case of *Johnson vs. Sayre* 158 U. S. 109 discussed most of the foregoing provisions in construing that portion of the Fifth Amendment to the Constitution which provides that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or

indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger." It was contended that the words "when in actual service in time of war or public danger" referred not only to the last preceding clause "or in the militia," but to the second preceding clause "in the land or naval forces" as well. In disposing of this contention the court said (158 U. S. at 114):

"All persons in the military or naval service of the United States are subject to the military law; the members of the regular army and navy, at all times; the militia, so long as they are in such service.

"Congress is thus expressly vested with the power to make rules for the government of the whole regular army and navy at all times; and to provide for governing such part only of the militia of the several States, as, having been called forth to execute the laws of the Union, to suppress insurrections, or to repel invasions, is employed in the service of the United States.

"The President is thus, in like manner, made commander in chief of the army and the navy of the United States at all times; and commander in chief of the militia, only when called into the actual service of the United States.

"The Fifth Article of Amendment recognizes the like distinction, between the regular land and naval forces and the militia, as to judicial authority. That the Constitution, as originally adopted, had recognized as to the legislative and the executive. It might as well be held that the words 'when called into the actual service of the United States,' in the clause concerning the authority of the President as commander in chief, restrict his authority over the army and navy, as to hold that the like words, in the Fifth Amendment, relating to the mode of accusation, restrict the jurisdiction of courts martial in the regular land and naval forces.

"The necessary construction is that the words, in this amendment, 'when in actual service in time of war or public danger,' like the corresponding words, in the First Article of the Constitution, 'call(ed) forth to execute the laws of the Union, suppress insurrections and repel invasions,' and 'employed in the service of the United States,' and those in the Second Article, 'when called into the actual service of the United States,' apply to the militia only."

The constitutional distinction between the armed forces of the states and the United States was recognized and followed by Congress in the Acts of 1916 and 1920, under which the state militia or national guard was organized both during the world war and at the present time. Those Acts provide as follows:

"The Army of the United States shall consist of the Regular Army, the National Guard while in the service of the United States, and the Organized Reserves, including the Officers' Reserve Corps and the Enlisted Reserve Corps." (10 U. S. C. A. Sec. 2.)

The Texas Constitution provides in Section 46 of Art. XVI that "the legislature shall provide by law for organizing and disciplining the militia of the state, in such manner as they shall deem expedient, not incompatible with the constitution and laws of the United States" and in Section 7 or Art. IV that the Governor "shall be commander-in-chief of the military forces of the State, except when called into the actual service of the United States. He shall have power to call forth the militia to execute the laws of the state, to suppress insurrection, repel invasion, and protect the frontier from hostile incursions by Indians or other predatory bands."

It has been held in three cases arising in the Court of Claims that the members of the National Guard of the various states while attending encampments are not, in times of peace, "troops of the United States," merely by virtue of the fact that they are trained as provided by Acts of Congress (National Defense Act) and paid from Federal appropriations. *Alabama Great Southern Rd. Co. vs. United States*, 49 C. Cls. 522; *Oregon-Washington Rd. & Nav. Co. vs. United States* 60 C. Cls. 458; *Ill. Central Rd. Co. vs. U. S.* 60 C. Cls. 499. In the *Ala. Gt. Sou. Rd. Co.* case that Court said that "the National Guard may become 'troops of the United States' but, . . . it is not the potentiality but the actuality of being in the service contemplated by the Constitution which fixes their status as 'troops.'" The same Court in the *Oregon-Wash. Rd. & Nav. Co.* case said:

"The requirements imposed upon the States in the training of their National Guard by the national defense act are strictly within the provisions of the Constitution. These requirements are all part of the purpose of the act, which was to have the National Guard so trained and disciplined that they would be ready for service as United States troops in the event that they were called into the service of the United States. None of these requirements infringed upon the rights of the States, none of them changed the character of the National Guard, which in time of peace is militia and in time of war may become United States troops, and when 'called forth to execute the laws of the Union, to suppress insurrection, and repel invasion,' are then in the service of the United States, and while in such service are to all intents and purposes United States troops.

"The argument made by the defendant that the oath required to be taken upon enlistment in the National Guard, *ipso facto*, makes the man taking it a soldier in the service of the United States is not sound.

"The National Guard has a dual character; it is militia in time of peace, and remains so after it is called forth for the purposes specified in the Constitution, but in the latter case is in the service of the United States instead of being in the service of the State, and the oath is prescribed so as to cover their service in both capacities, and also to prevent delay in inducting them into the service of the United States." (60 C. Cls. 464 and 465.)

A like decision was rendered by the Supreme Court of Wisconsin in *State vs. Johnson* 202 N. W. 191.

All of the foregoing opinions dealt with fact cases arising in time of peace. It may be urged that a different situation arises when war exists and the nation is mobilized for conflict. The historian, in numbering the armed forces of the United States during the late war, will probably include all men under arms, without distinction as to State or Federal service. We do not deal with such generalities, but look to the constitutional and legal meaning of the words used in the Act now under consideration. In such a case the question of whether a member of the State militia or National Guard was actually mustered into the service of the United States seems to us to be the controlling factor.

In *Highsmith vs. Usery* 25 Tex. Supp. 97, the Supreme Court of this State had before it for consideration a statute passed in 1843 which provided that property of all persons "now in the army of Texas, or as may hereafter be mustered into the service of the republic" should not be liable to forced sale so long as such person

remained in service. The facts disclosed that on the 16th day of July, 1847, the secretary of war, acting under authority of an act of Congress approved May 13th, 1847, issued a requisition on the governor of Texas to call out an additional military force for the protection of the Texas frontier. By virtue of such requisition Highsmith was called *into the service* of the *United States*, by the governor of Texas, as one of the Texas rangers, and was regularly *mustered into service* on May 10th, 1847, and remained in service being remustered on May 15th, 1848, and was finally discharged on December 26th, 1848. During said space of time he served as captain in the 1st regiment of Texas mounted volunteers upon the frontier of Texas, holding the office of captain by virtue of a commission issued by the governor of Texas. The question for decision was whether, under these facts, Highsmith was in the service of Texas, and thus entitled to the benefits of the statute of 1843. The opinion of the Court was delivered (date 1860) by Justice Roberts. After reviewing the facts and appropriate statutory and constitutional provisions, he said:

"These provisions of the constitution of the United States and of this state stand in harmony with each other, and show that it is contemplated that the militia of the state may be called into the service of the United States, and compose a part of its army, under the control of the president; and that, under circumstances and for certain objects, the militia of the state may be called into the service of the state, and compose its army, under the command of the governor of the state.

"The law of 1843, upon which appellant relies, may be applicable to persons engaged in the military service of the state and under the command of the governor.

"The facts proposed to be proved in this case do not present such a case. On the contrary, they show that Samuel Highsmith was engaged in the service of the United States. Nor do the facts stated, that he was commissioned as captain by the governor, and performed services upon the frontier within the state of Texas, make it any less the service of the United States, under the control of the President; for his being commissioned by the governor was only the exercise of a right reserved by the state to appoint the officers of her militia that may be called into the service of the United States. And his service within Texas was accidental, and might have been required by the president to have been performed in New Mexico or Arkansas, as well as in Texas.

"Highsmith was not 'mustered into the service of the state (republic) of Texas,' and, therefore, his property was not 'exempt from forced sale'."

We are now considering the exact converse of the facts considered by Justice Roberts. Here the guardsman was never mustered into the army of the United States, though he took the oath during the World War as a member of the Texas Calvary. A somewhat similar case was before the Supreme Court of New York for determination more than a hundred years ago. The president had called into Federal service the militia of the State of New York in the year 1814 for service in the war of 1812. Hundreds of members of the New York militia refused to obey the call and were never mustered into Federal service though the requisite presidential proclamation had been issued. Courts-martial were organized under Federal law, the delinquent members of the militia were fined for their refusal to obey the president's call, and the oxen of one de-

defaulter were levied upon for satisfaction of the fine assessed against him. On appeal to the Supreme Court of New York (A. D. 1821) it was held (*Mills vs. Martin* 19 Johnson's Reports 7) that since the militia member had not been actually mustered by Federal officers he was never in the service of the United States and therefore the Federal court-martial had no jurisdiction to assess the fine. The facts were much stronger there than in the instant case, for in the New York case the failure to muster was due to the soldier's mutinous refusal to obey the presidential call.

Considering the relation of the States to the Union, the dual citizenship of the citizen, the relevant constitutional provisions, and the statutes and cases based thereon, we are of the opinion and you are so advised, that the student mentioned by you did not serve in the armed forces of the United States during the World War. He would not be entitled to the benefits conferred by Chapter 147, General Laws, Regular Session, 38th Legislature. This answer to your first question renders the second moot, and no opinion is rendered thereon.

The opinion here rendered applies to all those public educational institutions of this State which are included within the provisions of the Act mentioned.

Sincerely yours,

R. W. YARBOROUGH,
Assistant Attorney General.

Op No. 2881.

APPROPRIATIONS—STATE BOARD OF CONTROL—ELEEMOSYNARY INSTITUTIONS—SPECIAL FUNDS OF ELEEMOSYNARY INSTITUTIONS—
SENATE BILL NO. 246.

By the appropriation bill passed by the Forty-second Legislature, Regular Session, for the various eleemosynary institutions for the years ending August 31, 1932 and August 31, 1933, respectively, found on pages 635 to 670, inclusive, General Laws of the Forty-second Legislature, all proceeds from the sale of any property belonging to any of the eleemosynary institutions, from labor performed, and from the sale of crops, and pay-patient funds, become a special fund for the use of such respective institutions to be expended under the direction and with the approval of the State Board of Control for any purpose proper and necessary in administering the affairs of the eleemosynary institutions, subject to the limitation that such funds shall not be used to supplement the appropriation made for any item for which specific appropriation is made.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, April 25, 1932.

State Board of Control, Capitol Station, Austin, Texas.

GENTLEMEN: Your letter of January 28th, addressed to the Attorney General, has been duly received, and reads as follows:

"On August 8, 1931 you rendered an opinion to the State Auditor to the effect that the local funds belonging to schools and eleemosynary institutions had to be deposited in the State Treasury and quoted in that

opinion Article 3179, as follows: 'All funds of every character received by or belonging to the institutions, other than money appropriated for their support from time to time by the Legislature, shall as soon as received be paid over to the State Treasurer by the Board, superintendent or other person receiving them. The Treasurer shall place such sums to the credit of the general revenue fund.'

"In the same opinion you quoted Article 3174, which reads as follows: 'Each eleemosynary institution established by law shall be managed and controlled in accordance with the provisions of this title. The general control, management and direction of the affairs, property and business of such institution is vested in the State Board of Control' which places the general control and management of the affairs of the eleemosynary institutions under the State Board of Control.

"The Board of Control requests your opinion as to whether or not when the local funds of the eleemosynary institutions are deposited in the State Treasury, could said funds be withdrawn on proper requisitions from the Superintendent of the institution and the Board of Control for the purpose of defraying the expenses of the eleemosynary institutions?

"In the second and third paragraphs of the General Provisions of the eleemosynary appropriation bill of the Forty-second Legislature, as shown on page 667, the language does not clearly set up a machinery by which the Board or the Treasurer would have authority to withdraw local funds from the State Treasury, and for that reason, we desire to know if this or any other statute would make it possible for the Board to withdraw these funds, and also set up a cash expense revolving fund, out of which the incidental expenses for perishables could be used. We recall that there was a cash expense revolving fund set up for the penitentiary board similar to the one that we desire."

The appropriations made by the Legislature for the various eleemosynary institutions for the years ending August 31, 1932 and August 31, 1933, respectively, will be found on pages 635 to 670, inclusive, General Laws of the Forty-second Legislature, Regular Session. On page 667 will be found the following language:

"2. No property belonging to any one of the above institutions (speaking of the State eleemosynary institutions) shall be sold or disposed of without the consent of the Board of Control; and all proceeds from the sale of any such property, from labor performed, and from the sale of crops and pay-patient funds, shall become a special fund to be expended under the direction and approval of the State Board of Control. The State Board of Control is hereby authorized to use out of the proceeds of said special funds, for purchase or otherwise, such amounts as may be necessary to equip each of the above institutions with radio, loud speakers, and talking picture machines, including necessary equipment for the entertainment and diversion and therapeutic improvement of the patients and inmates, and a complete statement of all such transactions shall be made in the annual report of said institutions."

You were advised by letter opinion under date of February 8, 1932 that the language contained in the last sentence of Section 2. above quoted, whereby the State Board of Control was authorized to use, out of the proceeds of the special funds as therein mentioned, so much thereof as was necessary for the equipment of such institutions with radio, loud speakers, etc. was a limitation upon the general language contained therein, and because of such limitation, the State Board of Control was inhibited from expending the local funds of the various institutions, except for the purposes therein set forth. Upon more mature consideration and more care-

ful study of the matter, we are convinced that in reaching such conclusion, the writer of the letter opinion was in error.

The maxim that the expression of one thing in the statute is the exclusion of others not expressed (*expressio unius est exclusio alterius*) is a sound and well recognized rule of statutory construction. However, it is not to be accepted as a hard and fast canon of statutory construction, but as a guide to point to the construction to be placed on the statute consistent with the legislative intent. *City of Lexington, Ex Rel. Menefee, vs. Commercial Bank* (Missouri Court of Appeals) 108 S. W. 1095.

The rule is sound and should be applied in a proper case, but it should be applied with caution as a rule to aid in discovering the legislative intent. This is its only function and purpose. It is a rule of construction rather than a rule of law. *American Rio Grande Land & Irrigation Company vs. Karle* (CCA) 237 S. W. 358. (Application for writ of error dismissed.) It should be applied only as an aid in arriving at the legislative intent and not to defeat it. *Jefferson County vs. Gray*. (Ky) 249 S. W. 771, Section 495, 2nd Edition, *Lewis Sutherland on Statutory Construction*. General words are to have a general operation in construing a statute unless manifest legislative intent was to restrict them. *Gaddy vs. First National Bank of Beaumont*, (Beaumont CCA) 283 S. W. 277. Certified questions answered by the Supreme Court in 283 S. W. 472.

The more literal construction of a statute ought not to prevail, if it is opposed to the intention of the Legislature apparent by the statute; and if the words are sufficiently flexible to admit of some other construction, it is to be adopted to effectuate that intention. Section 376, 2nd Edition, *Lewis Sutherland on Statutory Construction*, and authorities therein cited.

It will be noted that the Legislature in Section 2 of the Appropriation Bill said:

" * * And all proceeds from the sale of any such property (speaking of property belonging to the State eleemosynary institutions) from labor performed and from the sale of crops and pay-patient funds shall become a special fund to be expended under the direction and approval of the State Board of Control."*

Under the rules of the law hereinabove mentioned, these general words must be given effect unless it clearly appears by the use of other language in the bill that the Legislature did not so intend. We must accept this general language as evidencing the intent that such funds might be expended under the direction and with the approval of the State Board of Control for the benefit of the respective eleemosynary institutions to which such funds belong unless the authorization to "use out of the proceeds of said special funds for purchase or otherwise such amounts as may be necessary to equip each of the above institutions with radio, loud speakers, etc." is to be considered as evidence of the intent to restrict such expenditures to the equipment of the institutions with radio, loud speakers, etc.

In determining the meaning of the latter language, the language

itself is probably the best guide, rather than the rule of *expressio unius est exclusio alterius*. It was the failure of the writer to so treat the language that caused him to reach what he now perceives to have been an erroneous conclusion. The act states that for the purpose of equipping the institutions with radio, etc., the State Board of Control might use "*out of* the proceeds of said special fund" so much as is necessary for such purposes. The Board of Control had already been given authority to use all or any part of said funds for the purposes hereinabove mentioned, and a careful consideration now leads me to the conclusion that the express authority given to use "*out of*" funds which it already has authority to expend, so much as is necessary to effectuate the apparent purpose of the Legislature to authorize the Board of Control to equip the institutions with radio, etc., an expenditure that might possibly be considered by some persons as an unnecessary one, was not intended to nullify the Legislature's previously expressed intention to permit the State Board of Control to expend under its authority and direction any part or all of such funds as might be necessary and advisable to expend in administering the affairs of the various institutions.

You are therefore advised that it is our opinion that any special fund coming into the various institutions from the sources mentioned in Section 2 of the Act above mentioned, can be expended for any proper and necessary purpose in administering the affairs of the respective institutions, such expenditure or expenditures, however, to be made under the direction and control of the State Board of Control, so long as such funds are not used for any purpose prohibited by Section 3 of the Act, which reads as follows:

"3. The amounts appropriated in this Act are intended to cover and shall cover the entire cost of the respective items; and shall not be supplemented from any other source whatever, * * *."

That portion of the letter opinion to you under date of February 8, 1932, as above mentioned, which conflicts with this opinion, is hereby expressly overruled and withdrawn.

Very truly yours,

NEAL POWERS,

Assistant Attorney General.

Op. No. 2890.

CONSTITUTIONAL LAW—STATE TREASURY—SPECIAL FUNDS PROTECTED
BY SECTION 7, ARTICLE 8, STATE CONSTITUTION—STATUS
OF FUNDS IN STATE TREASURY.

1. The limitation on the Legislative power contained in Section 7, Article 8, of the Constitution, applies to Constitutional Funds and the income therefrom, but has no application to a purely statutory fund, created by legislative enactment.

2. Chapter 27, General Laws of the Second Called Session, Thirty-eighth Legislature (1923), abolished all special statutory funds then in the State Treasury.

3. All funds in the State Treasury are either Constitutional, Statutory,

Federal Aid, or Private Donation Funds. Status of each discussed herein.

4. Funds in State Treasury named and status determined herein.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, August 18, 1932.

*Hon. Geo. H. Sheppard, State Comptroller of Public Accounts,
and*

Hon. Moore Lynn, State Auditor and Efficiency Expert, Austin, Tex.

GENTLEMEN: The written request of Honorable Moore Lynn, State Auditor and Efficiency Expert, addressed to Honorable James V. Allred, Attorney General, and requesting an opinion concerning the status of certain funds carried on the books of the State Comptroller of Public Accounts and of the State Treasurer, supplemented by an oral request from the Honorable Geo. H. Sheppard, State Comptroller, accompanied by a mimeographed list of the funds carried on the books of the Comptroller's Department, has been received. A letter opinion covering these questions was delivered on August 28, 1931, but in view of your later requests for a conference opinion thereon and the general importance of the subject matter, that letter opinion has been revised and drafted into this conference opinion, which supersedes the opinion of August 28, 1931.

Your first question is as follows:

"1. In view of the constitutional inhibition on the diversion of special funds, is the Article quoted (4386) effective in abolishing the funds intended by it?"

Article 8, Section 7 of the State Constitution reads as follows:

"The Legislature shall not have power to borrow, or in any manner divert from its purpose, any special fund that may, or ought to, come into the Treasury; and shall make it penal for any person or persons to borrow, withhold or in any manner to divert from its purpose, any special fund, or any part thereof."

Chapter 27, Acts of the 2nd Called Session of the 38th Legislature, 1923, page 61, General Laws of said Called Session of said Legislature, reads in part as follows:

"Section 1. All special funds in the State Treasury, and all moneys now in such special funds or which, under present laws, or laws hereafter enacted, are to be placed in such special funds, are hereby transferred and made applicable to the general revenue fund and shall be applicable to general warrants against that fund. Hereafter, no special warrants shall be drawn by reason of any such special funds, but all warrants on the State Treasury shall be general warrants, and shall be on an equal basis with each other, except that in the event of a question and necessity arising as to the priority of payment of any such warrants, they shall be paid in the order of their serial number, such warrants to be numbered at all times in the order of receiving the accounts in the Comptroller's office.

"Sec. 2. The purpose of this Act is to place all moneys now in or to come to the State Treasury in the general revenue fund, and to do away with special funds set aside for particular purposes, and to provide that hereafter all warrants for moneys which would, under present laws, be issued against such special funds, shall be drawn and paid out of the general revenue fund along with other warrants drawn on such general reve-

nue fund, and that no preference shall exist in favor of such warrants, by reason of revenues and moneys being collected for particular purposes to constitute separate and special funds in the State Treasury.

"Sec. 3. This Act shall not apply to any special fund created or provided for in the State Constitution, which the Legislature is powerless to place in or make applicable to the general revenue fund, nor shall it apply to any special fund consisting of taxes set aside and remitted or donated by the Legislature to any county, counties, city, cities, or localities. Such constitutional funds and special tax remitting funds and the warrants against same shall be handled as under present laws.

"Sec. 4. Provided the terms of this Act shall not apply to any funds collected for and appropriated to the State Highway Department.

"Sec. 5. That neither this Act nor the provisions of same shall apply to the Special Game Fund, as provided for by Article 4039a, Revised Civil Statutes of the State of Texas."

This Act was condensed by the codifiers into Article 4386 of the 1925 Revised Civil Statutes and now reads as follows:

"Art. 4386. Certain Special Funds abolished.—All warrants on the State Treasury shall be general warrants, and shall be on an equal basis with each other except that in the event of a question and necessity arising as to the priority of payment of any such warrants, they shall be paid in order of their serial number, such warrants to be numbered at all times in the order of receiving the accounts in the Comptroller's office. This article shall not apply to warrants drawn on the Special Game Fund nor on funds collected for and appropriated to the State Highway Department, nor to any special fund created or provided in the State Constitution, nor shall it apply to any special fund consisting of taxes set aside and remitted or donated by the Legislature to any county, city or locality. Such constitutional funds and special tax remitting funds and the warrants against the same shall be handled under present laws. (Act 2nd C. S. 1923, p. 61)."

Your attention is directed to the fact that Section 7 of Article 8 of the Constitution of 1876 does not appear in any of the previous Constitutions of Texas, and was first placed in the Constitution by the Convention of 1875. This inhibition grew out of our Civil War experience. During that period portions of the university and public-school funds were diverted to other State purposes and other portions were used to purchase Confederate notes and bonds. Our Civil War and Reconstruction experience led the framers of the Constitution to place the quoted provision in the Constitution drafted in 1875. Its purpose was to protect the permanent endowment funds of the various State institutions. Since those funds were created and established by the Constitution, the body creating them saw fit to place it beyond the power of the lawmakers to in any wise alter or destroy them.

The quoted constitutional provision has no application to a purely statutory fund. The Legislature may abolish any special fund which it creates. That is fundamental. It may not interfere with those funds established by the Constitution. No purely statutory fund is affected by the quoted Constitutional provision. *Lawson vs. Baker*, State Treasurer, 220 S. W. 260, at 261. Your above quoted question is answered in the affirmative. The Act of 1923 was effective in abolishing those special funds intended to be covered by it. You call attention to the fact that a considerable portion of the Act of 1923 was omitted by the codifiers. That is immaterial, as the main purpose.

of the Act is carried forward in Article 4386 in the proviso that all warrants drawn on the State Treasury shall be general warrants.

Following your first question, the State Auditor and Efficiency Expert furnishes a list, supplemented by the State Comptroller of Public Accounts, which two lists cover practically all of the funds now in the State Treasury. You ask which of the named funds should be allowed to remain on the books of the Comptroller and State Treasurer as special funds, and which were abolished under the act of 1923 and Article 4386. Before naming and passing upon these specific funds, we desire to call your attention to some general principles applicable to the various funds which have from time to time been paid into the State Treasury. It appears from a study of the funds now in the Treasury, together with funds which have heretofore been in the Treasury, as revealed by the reports of the Comptroller of Public Accounts from the year 1857 to the present time, that all public funds which have come into the State Treasury may be classified under four general heads, as follows:

- A. Constitutional funds;
- B. Statutory funds;
- C. Federal Aid funds;
- D. Special funds, usually endowments, created by private donations made to the State or a State agency and containing certain restrictions as to their use.

The different funds named will be grouped under these four general heads. For that reason the funds as classified and enumerated in this opinion will not be in the same order in which they appear upon the lists submitted by each of you and neither will they be in the same order in which they appear in the printed annual reports of the Comptroller. We believe that in classifying them according to the manner of creation, the matter will be made clearer and some of the confusion now surrounding the laws applicable to funds in the State Treasury will be eliminated. The various classifications made by this department will now be taken up in their order and the special funds will be enumerated, and our opinion will be given as to the disposition which should be made of the various funds.

A. CONSTITUTIONAL FUNDS.

As stated above, all constitutional funds are special funds and must remain such. They will remain as they now are on the books of the Treasurer and the State Comptroller's Office, and cannot be disturbed by any Act of the Legislature. It was for that reason that the Act of 1923 specially provides that it should have no application to Constitutional funds.

A-1. Confederate Pension Fund—created and provided for in Article 3, Section 51 of the Constitution, consists of taxes received from levying a state ad valorem tax of seven cents on the One Hundred Dollars valuation.

A-2. Permanent School Fund—Article 7, Sections 2 and 5 of the Constitution.

A-3. Available School Fund—Article 7, Sections 3 and 5 of the

Constitution. Article 7, Section 5 of the Constitution reads in part as follows:

“No law shall ever be enacted appropriating any part of the permanent or available school fund to any other purpose whatever.”

Note that the Available School Fund includes one-fourth of the revenue derived from the State occupation taxes and a \$1.00 poll tax, in addition to certain other taxes and income.

A-4. State Textbook Fund—Section 3, Article 7 of the Constitution provides that it shall be the duty of the State Board of Education to set aside a sufficient amount out of the available school fund tax to provide free textbooks for the use of children attending the public free schools of this State. The free text book fund is a part of the available school fund of the State. The funds set aside under Section 3 of Article 7 of the Constitution are supplemented by certain fines, recoveries on bonds, sale of State text books, etc., made under Articles 2862 to 2876j of the 1925 Revised Civil Statutes. The State text book fund is really a Constitutional part of the available school fund, save and except that portion of the State text book fund collected under the authority of the above mentioned statutes. The collections under the statutes are replacement moneys only, being collected for lost, destroyed or sold books. The State text book fund is a Constitutional fund and must be kept separate from the general revenue. In view of the fact that the Constitution provides that a sum shall be set apart out of the available school fund for this special purpose, it seems to have been the intention of the framers of that Article that a special State text book fund would be carried. This construction is supported by the recitation contained in the above cited Articles of the Statutes, which deal with the State free text books.

A-5. Permanent Lunatic Asylum Fund—Article 7, Section 9 of the Constitution.

A-6. Permanent Blind Asylum Fund—Article 7, Section 9 of the Constitution.

A-7. Permanent Deaf and Dumb Asylum Fund—Article 7, Section 9 of the Constitution.

A-8. Permanent Orphan Asylum Fund—Article 7, Section 9 of the Constitution.

A-9. Permanent University of Texas fund—Article 7, Sections 11 and 15 of the Constitution.

A-10. Available University of Texas Building Fund.

A-11. Available Blind Asylum Fund.

A-12. Available Deaf and Dumb Asylum Fund.

A-13. Available Lunatic Asylum Fund.

A-14. Available Orphan Asylum Fund.

Insofar as the available funds named (A-10 to A-14) are composed of income from the permanent funds named, they are separate special funds and are not applicable to general revenue. If any part of the available funds named are derived from other sources they are not special funds and would be paid into the general revenue. The income derived from a permanent fund stands in a dif-

ferent category and is governed differently from funds derived from general taxation. The Austin Court of Civil Appeals in the case of Lawson vs. Baker, 220 S. W. 260, in an opinion dealing with the special Constitutional funds named and provided for in the Constitution, had the following to say with reference to the income from these special Constitutional funds:

"We think it is clear that the interest earned by deposit of special funds is an increment that accrues to such special fund, and any attempt of the Legislature to make such interest a part of the general revenue is futile, in the fact of the constitutional provisions creating or dedicating these funds to special purposes. The broad language of the act would seem to make the interest upon all funds, whether general or special, become part of the general revenue, and this portion of the law, if so construed, would authorize a diversion of the special funds from their constitutional purpose, would specially violate section 7, article 8, and would be unconstitutional and void."

You are therefore advised that the constitutional funds named are all special funds and the income from each of said constitutional funds also constitutes a special fund, and that these funds are in no manner affected by Article 4386 of the 1925 Revised Civil Statutes.

B. STATUTORY FUNDS.

B-1. First and foremost on the list is the general revenue fund. It is the general account into which general taxes and governmental income is paid and from which money is drawn to pay the general operating expenses of the Government. That portion of the general revenue fund derived from the State ad valorem tax on property is limited by Section 9 of Article VIII of the Constitution, which limits the rate of such tax for general revenue purposes to 35 cents on the hundred dollar valuation.

B-2. State Board of Barber Examiners Fund—This is a special fund created subsequent to the effective date of the act of 1923 and subsequent to 1925, and is therefore not abolished by the Act of 1923 or the codification of 1925. It is a later expression of legislative will and is created in clear and unmistakable terms. See Article 734a, Vernon's Annotated Penal Code of the State of Texas; Chapter 65, General Laws of the State of Texas, 41st Legislature, 1st Called Session; and Chapter 62, General Laws, 2nd Called Session, 41st Legislature at page 130. Section 27 of the Acts of the First Called Session of the 41st Legislature, as amended by the 2nd Called Session, page 130, General Laws, 2nd Called Session, 41st Legislature, reads in part as follows:

"All money so received shall be immediately deposited with the State Treasurer, who shall credit same to a special fund to be (known) as 'State Board of Barber Examiners Fund', which money shall be drawn from said special fund upon claims made therefor by the Board to the Comptroller; and if found correct, to be approved by him and vouchers issued therefor, and countersigned and paid by the State Treasury, which special fund is hereby appropriated for the purpose of carrying out all the provisions of this Act."

This language is clear, specific and unambiguous. It clearly evi-

dences the legislative intent to create a special fund and provides that special vouchers shall be issued against this special fund. It is a statutory special fund at present and must be kept separate under the present law.

B-3. Dissolution of Solvent Corporations Fund—This fund is really a Dissolution of Solvent Banking Corporations Fund. It refers solely to banks, its manner of creation and purpose being fully set out in Article 540 of the 1925 Revised Civil Statutes of Texas. That Article provides that where a solvent State Bank is dissolved and the bank is unable to find depositors or creditors who have sums coming to them, it shall at the expiration of six months pay to the State Treasurer all unclaimed deposits, moneys and credits *for the use and benefit of such depositors and creditors*. The moneys thus paid into the State Treasury are not paid in as the property of the State, but are for safe keeping for the use and benefit of the depositors and creditors who did not claim their deposits or funds. This fund is therefore a trust fund, and is to be held until those depositors or creditors call for the same, or until some different disposition is made by the Legislature of the sums so paid in.

B-4. State Highway Fund—The State Highway Fund, as shown from the quotation of Article 4386 and the Act of 1923 above, was excepted from the operation of that Act and that Article. It was so excepted by clear language, and you are therefore advised that the State Highway Fund is a special statutory fund not applicable to general revenue.

B-5. Highway Gasoline Tax Fund—This is a special fund created by Chapter 88, General Laws, 2nd Called Session of the 41st Legislature, Section 17, amending Article 7065 of the 1925 Revised Civil Statutes. Said section appears at page 181 of the General Laws of the 2nd Called Session of the 41st Legislature. It specifically provides that one-fourth of the gasoline tax shall go to the available free school fund and three-fourths shall be placed to the credit of the State highway fund, and that said gasoline tax income shall be set aside in a separate fund from the general revenue fund for the two purposes mentioned in said Act, and shall be subject to disbursement in accordance with the uses controlling the distribution of the available school fund and the State highway fund respectively. Since both the available school fund and the State highway fund are special funds, the Legislature logically provided that the gasoline tax, which was to be divided between them, should not become a part of the general revenue, but should be set apart in a special fund until the requisite division could be made. Refund claims are made from this gasoline tax fund and after the refunds are made, as provided by law, the balance of the fund is divided in the respective portions provided by law between the school fund and the State highway fund. This is a special fund. See Art. 7, Section 3 of the Constitution, which provides that one-fourth of the revenue from occupation taxes shall be set apart for the benefit of the public free schools.

B-6. Highway Light Test Fund—The Highway light test fund is also a special fund created subsequent to the passage of the Act of 1923 and is therefore a later expression of legislative intent and unaffected by said Act. See General Laws, Regular Session, 39th Legislature, 1925, Chapter 26 at page 137, and Article 6701, 1925 Revised Civil Statutes of Texas, Section 5. This Act provides that all fees paid under the highway light testing act shall be paid by the State Highway Commission into the State Treasury to be deposited in a fund to be known as a Highway Light Test Fund, "and the State Treasurer shall keep such fund separate." The Act further provides that said money shall be spent for the purposes of defraying the expenses of enforcing the highway light laws. This is a special fund and, like other highway funds, does not go into the general revenue fund.

B-7. Special Game Fund—This is a special fund not applicable to general revenue, the same having been, like the highway fund, especially provided for by the Act of 1923 and by Article 4386, 1925 Revised Civil Statutes.

B-8. Sand, Gravel and Shell Fund—This was created as a special fund by the 39th Legislature in 1925, Chapter 183, General Laws, Regular Session. See Article 4053d, Vernon's Annotated Statutes of 1925. Since this money is to be used by the Game, Fish and Oyster Commission, as is the special game fund, it was but logical to include it in that fund. I am informed by the State Comptroller's Office that there is now no balance in this fund in the State Treasury, the same being used with other game funds. This is a part of the game fund of the State, and will be governed by the Act creating same and does not, under existing laws, become a part of the general revenue of the State.

B-9. Pure Bred Cotton Seed Inspection Fund—This special fund was created by the 2nd Called Session of the 38th Legislature, that being the same session of the same Legislature which passed the Act abolishing special funds in the State Treasury. The Act abolishing special funds in the State Treasury is printed as Chapter 27 of the General Laws of the 2nd Called Session of the 38th Legislature, while the Act creating the pure bred cotton seed inspection fund is Chapter 56 of the same laws. The Act abolishing special funds was Senate Bill 74 of that session, while the Act creating the pure bred cotton seed inspection fund was House Bill No. 114. An examination of the bills in the office of the Secretary of State shows that Senate Bill 74, abolishing the special funds passed the Senate on May 11th and passed the House of Representatives on May 14th. The House Bill creating the pure bred cotton seed inspection fund passed both Houses on May 14th. Since both bills passed the Legislature on the same date, neither is the latest expression of legislative intent, and both must be read together and both sustained, if possible. This is a well settled rule of statutory construction.

Senate Bill No. 74, abolishing special funds, is a general law applicable to all special funds while House Bill No. 114, creating

the pure bred cotton seed inspection fund, is an exception to the Act abolishing special funds. Section 9 of House Bill 114 (page 129, General Laws, 2nd Called Session, 38th Legislature) provides that all money collected as fees under said Act shall belong to a special fund of this State and be credited by the State Treasurer to the "Special Pure Bred Cotton Seed Inspection Fund," and provides that the warrants drawn by the Comptroller of the State shall be special warrants and shall be paid out of the special pure bred cotton seed inspection fund. A part of this language was carried forward as Article 66 of the 1925 Revised Civil Statutes of Texas. The language clearly creates a special fund, to be known as the pure bred cotton seed inspection fund. The express language, together with the proviso as to warrants, clearly shows an intent to create a special fund, and this fund is properly carried on the books of the State Comptroller and State Treasurer as a special fund.

B-10. Emigrant Agency Fund—See Section 7, Chapter 36, General Laws, 3rd Called Session, 35th Legislature, 1917, also Chapter 96, General Laws, 2nd Called Session, 41st Legislature. The Act of 1917 provides for the collection of certain fees, and further provides that all fees collected are appropriated for the use of the Commissioner of Labor Statistics. Said Act does not create or set up a separate and special fund. In my opinion, this special fund should never have been set up on the books of the Comptroller, and this without reference to the Act of 1923 abolishing special funds. Assuming that it were created in the first place, still it was abolished by the Act of 1923 and the sums therein should have been paid into the general revenue of the State at that time. Chapter 96 of the laws of the 2nd Called Session, 41st Legislature, evidences no intent to create or continue a special fund under the emigrant agents act. An examination of the Comptroller's Report for the year 1922, the year prior to the passage of the act of 1923, shows that this fund was on the books at that time. The balance in this fund (the sum of \$100.00) has been unchanged for several years. It should be paid into the general revenue of the State. This special fund should be abolished, there being at the present time no statutory authority for continuing same.

B-11. Escheated Estates Fund, and

B-12. Settlement of Estates Fund—Both of these funds, the escheated estates fund and the settlement of estates fund, are very old, both having been carried on the books of the Comptroller's Department since long prior to the Civil War. The Comptroller's report for the years 1863 to 1865 shows that some substitutions were made at that time, a part of same was paid into the general revenue and part of same was used to purchase Confederate notes. In conversation with a representative of the Comptroller's Department, we learned that these special funds have been so carried on the theory that they are trust funds. We do not so regard them. The statutes dealing with escheated estates are Articles 3272 to 3289, inclusive, of the 1925 Revised Civil Statutes, constituting

Title 53 of said statutes. These articles provide that if a person dies without heirs the estate escheats to the State of Texas, and that the proceeds thereof shall be paid into the State Treasury. Said money when so paid is not paid as a trust fund, as are depositors' funds on the dissolution of solvent State banks under Article 540, 1925 Revised Civil Statutes. The proceeds of the escheated estate are paid into the State Treasury as funds of the State, and are collected by the State, not to be held in trust for the heirs, but to be held by the State. The payment is made to the State on the theory that there are no heirs and that the property belongs to the State absolutely and outright. Article 3285 of the Revised Civil Statutes provides that the Comptroller shall keep an account of money paid into the Treasury, and all lands vested in the State, under that title. That Article is important in view of the succeeding Articles.

Article 3286 and succeeding articles provide that if any person appears after the death of a person whose estate escheated to the State, and claims to be an heir, that he may sue the State in the district court of the county where the estate was sold. In case said claimant finally establishes by a judgment the fact that he is a true heir of the person whose estate escheated to the State, the Comptroller is authorized to issue a warrant on the Treasury for the repayment of the share due said heir, but without interest or costs. Consent to sue the State to recover money paid under this title does not constitute the fund paid over to the Treasurer a trust fund. Heirs do occasionally appear, and money is occasionally paid out. Under the procedure outlined in the statutes, a claimant may always sue the State, recover his judgment and obtain a warrant drawn by the Comptroller on the State Treasury. The warrant would be drawn on the general revenue fund. The Comptroller must always keep an account of all money paid into the Treasury from escheated estates, and a statement of the lands vested, first, because the statute requires it, and second, because it is absolutely necessary in order that in case a claim arises in the future, the State will have some means of checking the amount paid in. When the estate escheats, it becomes the property of the State and may be used by it as it sees fit.

The settlement of estates fund is a species of escheat. Moneys so collected are collected under Articles 3644 to 3660 of the 1925 Revised Civil Statutes. Those statutes deal with cases where a person dies leaving a certain number of heirs. On the distribution of his estate some of the heirs cannot be found. Any uncalled for share of the estate which would be due to them is paid into the State Treasury, much in the same manner as are escheated estates. Article 3652 and succeeding articles of the statutes give any claimant to these funds a right to sue the State and recover the share due to him. This follows the procedure outlined in case an estate escheats, and as above stated, is a species of escheat. The settlement of estates fund should be handled as is the escheated estate fund. Neither is a trust fund. Payments so made to the State are made to it in its own right and the

title vests in the State. An heir on appearance, where it was thought that none existed, in an endeavor to recover for such property as escheated to the State, is allowed to sue and get judgment against the State for a sum of money without interest or cost, and the statute provides that said sum shall be paid out of the State Treasury. It is contemplated by the statutes that these funds shall not be kept apart as trust funds, but that they shall be paid into the general revenue of the State. Had the Statutes contemplated that they should be kept as special funds, they would have so stated, and would have provided that the recovery so made by any heir on appearance should be paid out of that fund, and would have provided that he should recover his proportionate share of the sum formerly paid into the fund. The very wording of the statutes conclusively shows that these are not trust funds. The heir does not recover his property in any such manner, he recovers no specific money or property, but may recover judgment against the State for an amount equal to the value of his share, and the Comptroller is then directed to draw his warrant on the State Treasurer for the amount of the judgment. It should be noted, however, that warrants drawn by the Comptroller to pay judgments recovered on account of escheats and settlement of estates may be paid by the State Treasurer only on specific appropriations therefor, none of which may be made for a longer term than two years. See Constitution, Article 8, Section 6.

These funds, if made special funds by some statute in the past, were abolished as such by the Act of 1923. Both should be taken from the books as special funds and should be paid into and become a part of the general revenue fund of the State.

B-13. Live Stock Sanitary Special Fund—An examination of the Comptroller's reports shows that this fund first appeared in the reports as a special fund in 1921. We do not understand that any part of it was derived from federal aid. In 1922 the balance in the fund was the sum of \$44.72. That balance has remained unchanged to the present date. This fund was abolished by the Act of 1923 and the settled balance of \$44.72 should have been paid into the general revenue at that time. It should now be paid into the general revenue and that special fund should be abolished.

B-14. National Guard Fund—This is a special fund created by Chapter 29, General Laws, 2nd Called Session, 41st Legislature. The original sum was \$2,862.94 and was in the form of a treasury warrant of the United States. This amount was paid by the United States to the State of Texas, being funds to the credit of World War Units which were formed from the National Guard of Texas. The Act mentioned provides that it shall be held by the State Treasurer as trustee for the benefit of the National Guard of this State, and that said fund shall be held by the Treasurer in a special fund to be known as the National Guard Fund. That Act further provides that the Adjutant General of Texas shall expend said funds in a certain way for the benefit of the National Guard, and the Comptroller is authorized to draw his warrant upon said fund upon sworn accounts, etc.

The report of the Comptroller for 1930 shows that this fund had at that time a balance of \$1,584.94. Since it was paid by the United States to Texas, and the Act specifically provides that it shall be held by the State Treasurer as trustee in a special fund, we think that a special fund has been created in clear and unmistakable language. The fund is rapidly being paid out, and, as there is no income, it will soon be extinguished. When the balance of the fund has been paid out, this fund should be closed out on the books of the Comptroller, as it appears from the terms of the appropriation made and from the source from which it was received that there will be no further accretions to the same. Attention is called to the fact that this fund was created subsequent to the passage of the Act of 1923, and would be therefore unaffected by that Act.

B-15. Regulating Pipe Line Fund.—An Act regulating pipelines was passed by the 3rd Called Session of the 36th Legislature. Sections 11 and 12 of that Act (Chapter 14) provide for payment of certain taxes into the State Treasury, said payments to be designated as the gas utilities fund. The Act then appropriates certain amounts out of said sums so collected for the purpose of defraying the expenses incurred in enforcing the Act. These provisions have been carried forward into the 1925 Revised Civil Statutes. Article 6032 provides that "the tax thus collected shall be paid into the State Treasury as other revenue, and shall be paid out on warrants as other State funds."

Article 6060 provides that the tax shall be paid into the State Treasury. There is nothing in any of these articles to indicate that this is a special fund. We do not believe the designation in the Act of 1920 was sufficient to create a special fund; however, even if a special fund were created by the Act of 1920, the same was abolished by the Act of 1923 abolishing statutory special funds. The Comptroller's reports for the last several years show that the amount of money in the regulating pipe line fund equals the sum of \$10.14, and further shows that the status of this fund has not changed for several years. This amount should be paid into the general revenue and the special fund closed. It is not a special fund, as that term is used in law.

No special fund was created by the pipeline regulation bill passed by the First Called Session of the 42nd Legislature, (Chapter 28). I have examined the regulating pipeline bill passed by that session of the 42nd Legislature, and find nothing in the same creating or attempting to create a special fund.

B-16. Vital Statistics Fund.—See Laws First Called Session, 40th Legislature, 1927, Chapter 41, Section 21 at page 128, which reads in part as follows:

"And the State registrar shall keep a true and correct account of all fees by him received under these provisions, and turn same over to the State Treasurer at the close of each month, and all such funds shall be kept by the State Treasurer in a special and separate fund, to be known as the 'Vital Statistics Fund', and the amounts so deposited in this fund may be used for defraying expenses incurred in the enforcement and operation of this Act."

See also Article 4477, Rule 54a, Vernon's Annotated Texas Statutes, 1925. This fund was created subsequent to the passage of the Act of 1923. In so far as the Vital Statistics fund is concerned, this is the latest expression of legislative will, and creates a separate and special fund designated as hereinabove named. This fund should be permitted to remain on the books, as it constitutes no part of the general revenue.

- B-17. Bailey County Special Tax Fund.
- B-18. Crane County Special Tax Fund.
- B-19. Upton County Special Tax Fund.
- B-20. Cochran County Special Tax Fund.
- B-21. Winkler County Special Tax Fund.
- B-22. Loving County Special Tax Fund.

These funds are created, regulated and the purpose of same explained by Articles 7239, 7240 and 7241 of the 1925 Revised Civil Statutes. All of the same were created and in existence while the respective counties were unorganized. Before counties organize, their taxes are kept by the Comptroller to the credit of such unorganized counties. All counties have now been organized, the last being Loving County, which was organized in 1931. Of the other counties above named, Bailey County was organized in 1917, Crane County was organized in 1927, Upton County was organized 1910, Cochran County was organized in 1923 and Winkler County was organized in 1910. The special tax funds of those counties which have been previously organized should have been closed out heretofore. The accounts should be examined and all of those special tax funds save and except the Loving County fund should be closed out now. The small balances to the credit of the respective tax funds of the organized counties, none of which (excepting Loving County) exceeds \$18.00, should be paid to the county in whose name it stands, or to the county to which that county was formerly attached for judicial purposes. The balances should be transmitted to the proper County Treasurer in accordance with the provisions of Articles 7239, 7240 and 7241. The records in your office should show ownership of these funds, and all of these funds should be closed out.

As stated above, Loving County was organized in the year 1931. Since Loving County is now organized a settlement should be made with it of its special tax fund. You will probably be able to dispose of this fund within a short time, and then all special county tax funds will be closed out on the books of the State Comptroller and the State Treasurer, since all counties in Texas are now organized.

B-23. Unorganized County Tax Fund.—See Articles 7229, 7239, 7240 and 7241 of the 1925 Revised Civil Statutes. I am informed by a representative of the State Comptroller's Office that the bulk of the unorganized counties' county tax fund belongs to Loving County, which was organized last year. This account should be settled with Loving County, and any other counties which may be interested in same, and should be closed out in the manner hereinabove mentioned under the county special tax funds set out above.

B-24. Redemption of Land, Unorganized County Tax Fund.—In

connection with this fund, see Articles 7235, 7237, 7241 and 7291 of the 1925 Revised Civil Statutes. These statutes deal with the sale of land located in unorganized counties for taxes. They provide in brief that where the lands are so sold for taxes, the former owners may deposit with the Comptroller before the expiration of the two year period double the amount for which said lands were so sold for taxes, the said amount so "deposited" with the Comptroller to be paid by the Comptroller when called upon to the original purchaser or purchasers at the tax sale. Article 7241 provides as follows:

"All moneys received by the Comptroller on deposit for the redemption of land sold and bought by individuals shall be by him deposited in the State Treasury as a special deposit, subject to the order of the party to whom the conditional deed to such land was given."

This statute has been on the books for many years. Were the deposits so made merely special funds belonging to the State, same would have been abolished by the Act of 1923. However, it appears from the wording of the statute that the amount is deposited subject to the order of the party entitled to the same. The statute does not contemplate that this money shall be paid into the Treasury, as are escheated estates, as a part of the funds of the State, but are deposited as special deposits subject to the order of and for the benefit of the persons entitled to the same. This fund, as distinguished from the escheated estates fund, is a trust fund for the benefit of the purchasers at the tax sales. In that respect it resembles the fund for the benefit of depositors in solvent State banks, defined by Article 540 of the Revised Civil Statutes of Texas, and mentioned hereinabove in this opinion. This fund, being a special fund under the wording of the respective articles, must be kept as such for the credit of the individuals who may claim the same. Since the annual reports of the Comptroller show that there has been no change in the status of this fund since prior to 1922, and since all counties are now organized, we think that you might appropriately ask the Legislature to authorize you to dispose of this fund in some other manner. However, you have no present authority to do other than leave this as a special fund. In any event a record should be kept showing the sources of the fund so that the State will be protected in case claims be made in the future.

B-25. Excess Purchase Price, etc., Fund.—The nature of this fund is explained by Chapter 9, Title 122, of the Revised Civil Statutes of Texas, 1925, said chapter dealing with back taxes on unrendered lands, and making provisions for sale of said lands for said taxes. The article of said chapter establish the procedure to be followed in making said sales, and provide for payment of the proceeds of the sales into the State Treasury. Article 7316 reads as follows:

"Taxes collected by the State or county by sales made under the provisions of this chapter, shall be placed to the credit of the different funds for which originally assessed under the direction respectively of the Comptroller and the commissioners' court of the county in which the sale is made; the balance of the proceeds, after satisfying all taxes, penalties and costs accrued, shall, under the direction of the Comptroller, be placed in the

State Treasury, subject to be reclaimed by the owner of the land on proof as required in case of escheated estates."

It will be noted that only the balance of the proceeds after satisfying all taxes, penalties and costs, shall be subject to be reclaimed by the owner of the land. The statute further provides that these funds shall be deposited in the State Treasury to the credit of the fund for which assessed, namely, Confederate Pension fund, available school fund, or general revenue. The excess over the amount of taxes, penalties and costs may be recovered by the owner only on proof and in the manner as required in case of escheated estates. As hereinabove held, the fund collected in escheated estate cases belongs to the State and is not a trust fund. The statutes on escheated estates make it clear that the claimant must establish by satisfactory proof his right to receive not a part of a particular fund, but an order on the State Treasury for payment of certain sums of moneys out of the general revenue fund which are on deposit.

Since the statutes relating to escheated estates govern in this case also, the excess purchase price fund would be in the same category. This fund has been on the books of the Comptroller's office for many years. It was in existence in 1923, the date of the passage of the Act abolishing special funds. Since it was not abolished by the Comptroller at that time, the balance now on hand should be placed in the general revenue fund, and this special fund abolished.

B-26. University of Texas Fee Fund.

B-27. University of Medical College Fee Fund.

B-28. University of Texas Extramural Division Fund.

B-29 University College of Mines and Metallurgy Fee Fund.—These fee funds are not special funds, but should be carried on separate accounts and made applicable to general revenues. They are carried on separate accounts because the amount collected by each school is appropriated to that school by Chapter 284, General Laws, Regular Session, 42nd Legislature, being an act appropriating money for the support of State educational institutions of higher learning. What is here said with reference to fees of the University of Texas applies also to students' fees of all the State educational institutions of higher learning, and applies also to dormitory charges and certain other fees collected by said schools. All of said collections will be carried to the credit of the respective school at which collected, and expenditure of the entire fund is authorized by the appropriation of the Legislature. Said accounts, however, will be applicable to general revenue, because there is no act of the Legislature making them special funds. In connection with the statutes on these funds, see letter opinion addressed to Honorable Moore Lynn, dated July 28, 1931, same relating to various fees of the different State educational institutions of higher learning.

B-30. Texas State Railway Fund.—This fund is practically closed at the present time. A warrant for the sum of \$5.25 has been outstanding for a number of years. There is no money to the credit of this fund at the present time, and when the outstanding warrant of

\$5.25 is considered, a deficit exists in said fund. This fund was first created in 1919 and was abolished by the Act of 1923. You will, therefore, close out said fund on your books. The outstanding warrant could only be paid at the present time by further appropriation, since there is now no balance from which payment could be made.

B-31. Special Loan Tax Fund.—This fund had its origin during the Civil War. It first appeared in the reports of the Comptroller in the biennial report of 1863-65. Page 8 of that report carries an item of \$79,409.50. The notation there made shows that this sum is evidenced by Comptroller's certificates of State indebtedness which were substituted for an equal amount of warrants, which warrants were cancelled or destroyed by the Comptroller. For mention and explanation of the destruction of the warrants for which the Comptroller's certificates of State indebtedness were substituted, see page 6 of the annual report of the Comptroller for 1874. This special tax account, showing a balance of \$79,409.50, appeared at page 14 of the biennial report of the Comptroller for 1867-68. The amount has been carried unaltered on the books of the Comptroller since that date. It is usually listed as notes. It would seem that instead of being a balance to the State's credit, totalling that sum, this would really be a deficit, as these certificates of indebtedness were issued by the Comptroller to replace warrants which were destroyed. They are certificates of State indebtedness.

The annual report of the Comptroller for the year 1873 carries this notation at page 105:

"Worthless Accounts"

"That do not represent money, and from which nothing can be realized, are carried from year to year on the books of this office.

"These accounts are as follows:

"'2. The Special Loan Tax has, in the Comptroller's Office, certificates of indebtedness to the extent of \$79,409.50.'

"An act of the Legislature is necessary to enable the Comptroller to drop these accounts from the books of this Department."

The Comptroller's report for 1874 stated that the Legislature should act, the validity of these certificates be determined, and if found invalid, should authorize that they be dropped from the books.

In all probability these certificates were in lieu of warrants which were issued in aid of the Confederacy and therefore void. Due to the long lapse of time, it is extremely unlikely that a valid claim could be presented and proved for any share of these certificates, based upon a warrant for which these certificates of State indebtedness were substituted. However, the Comptroller has no present authority to drop these warrants from the books. It seems to me that due to the long lapse of time with no claim being filed, there would at least be a presumption that there were no valid claims against the State for any part of the sum which they evidence. Reference is made to the reports of the State Comptroller of Public Accounts for the years 1873 and 1874, and we can only renew the recommendation there made to the Legislature.

C. FEDERAL AID FUNDS

C-1. Agricultural and Mechanical College Fund—There has been in this fund for many years State bonds in the total sum of \$209,000.00. This is the Agricultural and Mechanical College's perpetual fund arising from the sale of 180,000 acres of land donated to the State of Texas by the United States under the provisions of Acts of Congress passed on July 2, 1862 and July 23rd, 1866, together with interest on said sums up to 1876. See Articles 2614 and 2615, 1925 Revised Civil Statutes of Texas; see also Miller's Financial History of Texas, pages 175, 176 and 376. This fund is really the permanent fund of the Agricultural and Mechanical College, but derived from the Federal Government and not from the State of Texas. Under the Acts of Congress mentioned, Texas received from the United States land script for 180,000 acres of land. This script was sold in 1871 at 87 cents per acre, the amount realized being \$156,600.00. See Miller, page 176, and see also the report of the Comptroller for 1872, page 14. This notation is found at that page in said report:

"To amount deposited by Governor E. J. Davis as proceeds of investment of land script donated by the United States Government, viz:

"In 7%, Frontier Defense Bonds of the State, \$174,000, interest accrued on bonds and paid by the State, \$5,880.00, total \$179,880."

The report of the Comptroller for the years 1876 and 1878, at page 11, states that the Agricultural and Mechanical College fund account totals \$219,000.00 in bonds and \$58,219.03 in currency. Not long thereafter this amount was reduced to its present total of \$209,000.00, at which it has since remained.

The Agricultural and Mechanical College of Texas is a branch of the University of Texas. This fund is its permanent or perpetual fund. Its perpetual fund was created by a gift from the Federal Government. The Legislature has no authority to place same in the general revenue and same must be held separate in the same manner in which the permanent fund of the University of Texas is set apart. Under the recent Act of the Legislature of Texas dividing the permanent fund of the University of Texas between the University and the Agricultural and Mechanical College, that portion going to the Agricultural and Mechanical College will also constitute a part of the permanent or perpetual fund of the Agricultural and Mechanical College. It is protected and guaranteed by the Constitution and no part of same could be placed in the general revenue or otherwise diverted by the Legislature. The Agricultural and Mechanical College will thus have a permanent fund composed of gifts both from the Federal Government and from the State of Texas.

C-2. Federal Vocational Fund—This fund is made up of payments by the Federal Government to aid vocational education. The provisions of the Federal Act were accepted by the State of Texas by an Act of the 36th Legislature, Regular Session, 1919, being chapter 114 thereof. The State Treasurer is designated as the custodian

of the funds received by the State from the appropriations made by the Federal Act, and the Act of the Legislature provides that the same shall be disbursed in accordance with the Federal Act. The Act of the Legislature further provides that the State will do all things necessary to entitle it to receive the full benefits of the Federal Vocational Appropriation. The Federal Government in making appropriations to the States for vocational education and other purposes retains considerable control over the funds, and dictates not only the manner in which the funds shall be expended, but attempts at the same time to control the State's system of education to the extent of the purposes for which the Federal funds are appropriated. See Chapter 2, Title 20, United States Code Annotated (1925). Section 27 of title 20 of said Code reads in part as follows:

"If any portion of the moneys received by the custodian for vocational education of any State under this chapter, for any given purposes named in this chapter, shall, by any action or contingency, be diminished or lost, it shall be replaced by such State, and until so replaced no subsequent appropriation for such education shall be paid to such State."

The State Treasurer has carried this fund as a special fund. In so doing, he properly complies with the requirements of the Federal Government. In order to be entitled to the appropriation, he would have to expend the funds and carry it in such manner as the Federal Board or Bureau may provide.

C-3. In addition to the Federal Vocational Fund, the annual reports of the Comptroller disclose that the rural sanitation special fund (then called Rural Health Fund) was first established in 1919.

C-4. Social Hygiene Fund (then called Federal Hygiene Fund) was also first established in 1919. The bulk of these two funds, as well as the federal vocational fund, comes from appropriations made by the Federal Government. These three funds named, being derived from the Federal Government, should be kept in separate accounts or in any other manner which the Federal Government may require. There is an old saying that one cannot look a gift horse in the mouth, and if the State is to receive these handouts, it must comply with the requirements of the power giving the dole. See Reports of the Comptroller for the year 1919, pages 5 and 6, calling attention to the appropriations made by the Federal Government, the fact that they are insignificant as compared to the control established by the Federal Government in administering that particular phase of social activity, and calling further attention to the fact that the State loses its supervisions over its own appropriations in making them so as to comply with the Federal Acts.

C-5. Rehabilitation Fund,

C-6. George Reed Fund—These two funds have been set up within the last two years. The First Called Session of the 41st Legislature accepted the benefits of an Act of Congress passed June 2, 1920 and June 5, 1924, providing for promotion of rehabilitation of persons disabled in industry or otherwise. The Act provides that

the Treasurer of Texas is authorized to receive the funds appropriated under the Act of Congress, and that the State will co-operate upon the terms and conditions imposed by the Federal Government. The Comptroller's report for 1930 shows that the bulk of the George Reed fund is also derived from the Federal Government, and is for vocational education. These two funds will be held separate or in any manner which the Federal Bureau directs, and will be expended in accordance with their rules.

D. SPECIAL FUNDS CREATED BY PRIVATE DONATIONS

D-1. Endowment Fund, Medical Branch, University of Texas—We have been informed that this fund was derived from private gifts in the sum of \$5,000.00. Such donations made by private individuals are in the nature of trust funds and must be held in separate accounts to effectuate the purposes of the trust. Those making these donations may make them on such terms as they see fit and if the State accepts same, it must accept them on those terms. This fund is a special fund and it is beyond the power of the Legislature to place same in the general revenues of the State.

The same observation is applicable to those special trust funds which may be created by gifts to the State's use or to other State educational institutions. If said gifts are made in the nature of an endowment or gift for a particular purpose for which a permanent fund is to be retained, they will be paid into special accounts and will so remain. In the event any gift is made to any of the State institutions in which no trustee is named, said fund would, of course, be deposited in the State Treasury but in a special fund and would be administered in accordance with the terms of the donation. See letter opinion to Dr. H. Y. Benedict, August 4, 1931. Of course private donations could be made to the State without restriction or specification, and if so made would become a part of the general revenue. Such uninstructed donations will likely be rare indeed.

Very truly yours,

R. W. YARBOROUGH,
Assistant Attorney General.

Op. No. 2905.

STATE DEPARTMENT (Appointment of Employees of Vocational Educational Department)—STATE BOARD OF VOCATIONAL EDUCATION (Appointive Power)—STATE SUPERINTENDENT OF PUBLIC INSTRUCTION—STATUTES CONSTRUED.

1. The State Board of Vocational Education has the authority to appoint the employees in the Department of Vocational Education.
2. Under resolution of the State Board of Vocational Education, the State Superintendent of Public Instruction is made its executive officer with the power to appoint the persons employed in the Department of Vocational Education, that is, the division carrying out the work authorized by Chapter 131, General Laws of Texas, Regular Session, Thirty-eighth Legislature.

3. The State Board of Vocational Education may modify its order making the State Superintendent its executive officer with power to appoint the employees of the Vocational Educational Department and divest the State Superintendent of the appointive power granted him under said resolution. If the State Board divests the State Superintendent of the power to appoint the employees in the Vocational Educational Department, the State Board may resume the power it had delegated to the superintendent and thereafter appoint the persons in said department.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, January 16, 1933.

*Hon Nat M. Washer, President, State Board of Vocational Education,
Majestic Theater Building, San Antonio, Texas.*

DEAR SIR: This will acknowledge receipt of your communication of December 30, addressed to Attorney General James V. Allred.

Your ask that we advise the State Board of Vocational Education with reference to the following inquiry, towit:

"Has the State Board of Vocational Education the authority to appoint and employ the various employees in order to carry out the work authorized under the statute, Chapter 131, Acts of the 38th Legislature, Regular Session, 1923?"

By an act of Congress (39 Stat. L. 929) popularly known as the Smith-Hughes Act, there are appropriated out of the moneys of the United States certain sums to be expended, upon conditions therein stipulated, to co-operate with the states accepting the provisions of said act in paying salaries of teachers, supervisors and directors of agricultural subjects and of teachers of trade, home economics and industrial subjects, and in paying expenses incident to the training of teachers of the subjects aforesaid. There is created by said act a Federal Board of Vocational Education to administer the act in behalf of the federal government, and to co-operate with the administrative agencies of the states in the administration of the act. Among the conditions precedent to the granting of federal aid, tendered to the states by said act, are those contained in Section 5, which reads in part as follows:

"That in order to secure the benefits of the appropriations provided for in sections two, three, and four of this act, any state shall, through the legislative authority thereof, accept the provisions of this act and designate or create a State Board, consisting of not less than three members, and having all necessary power to cooperate, as herein provided, with the Federal Board of Vocational Education in the administration of the provisions of this act. The State Board of Education, or other board having charge of the administration of public education in the State, or any State board having charge of the administration of any kind of vocational education in the State may, if the State so elects, be designated as the State board, for the purposes of this act."

The Legislature of the State of Texas accepted the provisions of the Smith-Hughes Act and, by statute enacted, designated the State Board of Education as the State Board of Vocational Education "with necessary authority and power to co-operate with the Federal Board of Vocational Education, as provided and required by the said act of Congress, in the administration of the provisions

of said act; and to do all things necessary to entitle the State to receive the full benefits thereof." Chapter 131, Acts Regular Session, Thirty-eighth Legislature.

The question which has been submitted for our consideration must be answered by determining whether the power delegated to the Board of Vocational Education to co-operate with the Federal Board in the administration of the provisions of the federal act and to do all things necessary to entitle the State to the benefits tendered by the federal act includes the power to appoint the various employees in the Vocational Educational Department.

An examination of the Smith-Hughes Act discloses that federal moneys are appropriated to pay the salaries of teachers, *supervisors*, and directors of agricultural subjects, and to pay the salaries of *teachers* of trade, home economics and industrial subjects, and that federal moneys are appropriated to defray expenses of *training* teachers of agricultural, trade, industrial and home economics subjects, all appropriations conditioned that the state match, dollar for dollar, the federal appropriation allotted to the state for each of the purposes enumerated. It is to be observed that while the Smith-Hughes Act makes an appropriation for the payment of salaries of supervisors of *agricultural* subjects, no appropriation is made by said act to pay the salaries of supervisors of *trade, home economics* and *industrial* subjects.

The Federal Board has ruled, however, that a portion of the *teacher training funds* may be used to pay the salaries of supervisors of trade, industrial and home economics subjects *under the following conditions*:

1. That a plan of supervision be set up by the State board and approved by the Federal board.
2. That the qualifications of supervisors be set up by the State board and approved by the Federal board.
3. That all supervisors employed in connection with supervision for the maintenance of which Federal funds are used shall meet the qualifications set up by State board and approved by the Federal board, and that such supervisors shall be employed by and be responsible to the State board for vocational education.

(Extracts from Bulletin No. 1, "Statement of Policies" Federal Board for Vocational Education, Revised Ed., December, 1926.)

Among the positions which may be listed as positions in the Department of Vocational Education are those of supervisors of agriculture education, of trade and industrial education, and of home economics. It is clear, under the ruling of the Federal Board, that supervisors paid in part from federal funds for teacher training, *must be employed by* and be responsible to the state board for vocational education. From the fact that under the Smith-Hughes Act supervisors of trade, industrial and home economics subjects may be paid *only* from federal teacher training funds, the conclusion follows that the State Board of Vocational Education, having the power to do all things necessary to secure the federal aid in those fields, has the exclusive power to appoint supervisors of trade, industrial and home economics subjects in this State where

such supervisors are paid in part out of the moneys appropriated by the Smith-Hughes Act.

Subsequent to the Smith-Hughes Act the Congress of the United States enacted what is popularly known as the George-Reed Act, adding to the federal funds appropriated by the Smith-Hughes Act, certain smaller sums than those appropriated by the Smith-Hughes Act and providing that the sums appropriated in the later act be used to co-operate with the states, under the conditions prescribed by the earlier act, in paying the salaries of teachers, supervisors, and directors of agricultural subjects, and of teachers, *supervisors* and directors of home economics subjects.

While the ruling of the Federal Board requires that supervisors of trade, industrial and home economics subjects, paid in part from the moneys appropriated by the Smith-Hughes Act, be appointed by the state board for vocational education, the ruling does not govern the appointment of supervisors of home economics paid in part from the moneys appropriated by the George-Reed Act or supervisors or directors of agricultural subjects.

By Sections 8 and 10 of the Smith-Hughes Act, the state board is required to prepare plans showing how it is intended that the subsidized work of vocational education is to be carried out in the state. The Federal Board has required that these plans be prepared for 5-year periods. The various state boards since 1918 have shown in their several plans for the administration of vocational education in this State that the work shall be carried out under the direct supervision of the State Board. Since 1922 the board has included in its plans the statement that the State Board of Vocational Education will employ the directors and supervisors of agricultural, trade and industrial and home economics education carried on in this State. This arrangement has always been approved by the Federal Board. The same arrangement has been made between the State Board and the Federal Board for the period beginning July 1, 1932, and ending June 30, 1937. It is submitted that the arrangement made by the State Board with the Federal Board in reference to the employment of persons to be paid in part out of the federal moneys should be upheld if it is possible to do so, since the good faith of the State has been pledged by the legislature to the federal government that the State will co-operate in the administration of the subsidized work in vocational education by and through the State Board of Vocational Education as the administrative agency of the State in that work, and in view of the fact that the State Board, acting as the representative of the State, has promised that the work shall be carried out in a prescribed manner—that is, in accordance with its plans.

The board has not only published in its plans for administration of vocational educational work in this State that *it* will employ the persons engaged in carrying out the subsidized work but it actually has employed or has had employed the persons engaged in that work over a period of fifteen years that the law has been in operation. The board, therefore, has construed the statute as

vesting in it the power to appoint the persons whose employment is now in question.

The official minutes of the State Board of Education from December 6, 1917, to the present date reflect the construction placed upon the act in question by the State Board of Vocational Education by the following actions taken by it in regard to the employment of the personnel of the Vocational Department:

Dec. 6, 1917—Appointment of J. D. Blackwell as Director of Vocational Agriculture, salary fixed. Minutes of State Bd. for Voc. Ed., p. 4.

Dec. 1, 1917—Appointment of Assistant Director of Vocational Agriculture, salary fixed. *Ibid.*, p. 6.

Dec. 10, 1917—Resolution making state superintendent executive officer and defining his duties. *Ibid.*, p. 8.

Jan. 10, 1918—Appointment by Board of Miss Crigler as supervisor of vocational home economics at salary of \$3,000 per year and appointment of N. S. Hunsdon as supervisor of industrial education at salary of \$3,000 per year. *Ibid.*, p. 10.

Aug. 10, 1918—The Board *re-elected* the following vocational directors to their respective positions; Miss Crigler, director of vocational home economics; J. D. Blackwell, director of vocational agriculture; N. S. Hunsdon, director of industrial education. *Ibid.*, p. 17.

Sept. 13, 1918—Board passed resolution directing secretary to write Judge Carl, secretary of the State Council of Defense, informing him that under the Smith-Hughes act the State Board for Vocational Education, has employed N. S. Hunsdon, State Director for Industrial Education, to supervise trade and industrial subjects in the schools. *Ibid.*, p. 22.

Oct. 15, 1918—Secretary reported resignation of Miss Crigler as director of vocational home economics work; appointment by Board of Miss Allie George to fill the vacancy. *Ibid.*, p. 23.

Dec. 11, 1918—Board elected C. L. Davis as assistant Director of Vocational Agriculture at salary of \$2,800 per year. *Ibid.*, p. 25.

Jan. 13, 1919—Approved by Board of Budget for administration and supervision of Smith-Hughes law for vocational education January 1, 1919 to July 1, 1919, salaries designated. *Ibid.*, p. 28.

May 10, 1919—Board elected Agnes Harris, Director of Vocational Home Economics. *Ibid.*, p. 34.

June 10, 1919—Board re-elected Mr. Hunsdon and Mr. Blackwell. *Ibid.*, p. 38.

Sept. 10, 1919—Approval of the Appointment of Dorothy Sells, Assistant Director of Industrial Education. *Ibid.*, p. 45.

Aug. 10, 1920—Board instructed Secretary to state to C. L. Davis, Assistant Director of Vocational Agriculture, that the Board desired not to accept his resignation; Miss Blanton was instructed to offer Mr. Davis a salary of \$3,700 per year to remain and take the position of Director of Vocational Agriculture; salaries of the director of Home Economics and director of trades and industries were fixed at \$3,500; Mr. Hines was promoted to the position of Mr. Davis. *Ibid.*, p. 73.

Aug. 26, 1920—Readjustment of salaries of Assistant and Supervisor of Home Economics and Assistant Director of Trades and industries. *Ibid.*, p. 74.

Sept. 15, 1920—The Board approved appointment of J. B. Rutland as Assistant Director of Vocational Agriculture. *Ibid.*, p. 74b.

Aug. 23, 1921—Budget for vocational division approved. *Ibid.*, p. 93.

June 10, 1922—Leave of absence for N. S. Hunsdon and C. L. Davis granted. *Ibid.*, p. 109.

July 13, 1923—Action on selection of J. M. Hall, Director of Industrial Education and J. J. Brown, Assistant Director of Agricultural Education postponed for later consideration. *Ibid.*, p. 127.

July 21, 1923—Selection of J. M. Hall, Director of Industrial Education approved. *Ibid.*, p. 128.

Jan. 13, 1930—Resolution making the State Superintendent executive officer of the State Board and granting him power to appoint the personnel of the division administering the vocational educational laws subject to the approval of the State Board.

The construction placed upon a statute, the meaning of which is not clear, by the administrative officers charged with its enforcement, is entitled to great weight in the interpretation of the statute, and where the interpretation has been uniformly applied over a long period of time it should be followed unless it is clearly erroneous or against the plain meaning of the statute. Lewis' Sutherland on Statutory Construction (2d ed.) Section 473 et seq.

The question with which we are presently concerned is whether the power to appoint persons for whose actions it is responsible was granted to the State Board of Vocational Education by grant of power to co-operate in the administration of the federal act and to do all things necessary to secure for the State the aid tendered by the federal government. The grant of power to the State Board is broad enough to include the power to appoint the persons in question if it is reasonably necessary that it do so in order to secure the aid of the federal government. We are unable to say that the power granted did not include the power in question.

The attention of the writer has been called to Article 2656, Revised Civil Statutes of 1925, which provides, in part, that the State Superintendent "may employ such clerks to perform the duties of his office as may be authorized by appropriations therefor." It is contended that the State Superintendent has the authority to employ the persons engaged in the Vocational Educational Department. Under Article 2656 the superintendent has authority to employ clerks where there are appropriations made for that purpose *and* where such clerks are to perform the duties of *his office*. The appropriations made by the State of Texas to match federal vocational educational funds are not made to the State Department of Education, but are made to the State Department of Vocational Education. The State Superintendent, his assistants, the clerks and other employees in his office are paid out of appropriations made to the State Department of Education. The appropriation made to the State Department of Vocational Education sets out a stipulated sum to match federal vocational education funds with the following proviso:

"Provided that the State Board for Vocational Education shall have the authority to expend for salaries and expenses in administration and supervision out of the funds hereinabove, sums not to exceed \$23,950.00 for each of the fiscal years ending August 31, 1932 and 1933, to match the federal funds and to comply with the provisions of the several acts of the legislature."

The legislature has therefore indicated that it considered the State Board of Vocational Education as being the administrative head of the State Department of Vocational Education instead of regarding the State Superintendent as head of that department.

In the foregoing paragraphs of this opinion it was pointed out that the State Board has the exclusive power to employ certain of

the employees in the Vocational Educational Department, that is, the exclusive authority to appoint supervisors of trade, industrial and home economics subjects where they are paid in part out of the federal funds appropriated by the Smith-Hughes Act. If we are to say that this is the limit of the board's power to appoint, then it is evident that some other officer has the authority to appoint other of the employees in that division.

The federal government saw fit to require that a state board be designated or created to co-operate with the federal government in administering the federal aid in the state. All of the employees of the department of vocational education are ostensibly engaged in carrying out the work which the federal government has assumed to subsidize. The state board is the agency of the state to which the federal government looks for the proper administration of the act of Congress in the state, and the state board is responsible for the proper administration of the subsidized work within the boundaries of the state. If it be said that the State Superintendent has the power to appoint the personnel of the Vocational Educational Department other than those which the Federal Board requires the State Board to appoint, then the State Board becomes responsible for the actions and judgment of persons not under its control—for the actions and judgment of persons whose qualifications are considered and judged by an officer over whom the board has no control. Should this be our conclusion confusion would necessarily result, and some of the persons who are engaged in the administration of the subsidized work would be responsible to one officer and other of the employees to another officer. We do not believe that such a situation was intended by the legislature to be created.

In view of the long continued construction placed upon the act in question by the State Board in its official capacity as the administrative board charged with the enforcement of the act, and in view of the uniform application which has been made of the construction of the board over the period of fifteen years that the law has been in operation, you are advised that in our opinion the State Board of Vocational Education has the power to employ the personnel of the Vocational Educational Department.

The following resolution of the State Board of Vocational Education was approved and entered on its minutes January 13, 1930:

"BE IT RESOLVED by the State Board for Vocational Education that the State Superintendent of Public Instruction shall be the executive officer of the State Board for Vocational Education for the purpose of administering all provisions of the Federal and state laws affecting vocational education in this state,

"That the personnel of the division administering said law shall be selected by the executive officer subject to the approval of the State Board for Vocational Education,

"That all employees under said laws shall be under his immediate direction and supervision and he shall approve all items included in the disbursement of the funds set aside for administration expenses and in the operation of the Civilian Rehabilitation division.

"All other disbursements shall require the approval of the State Board

for Vocational Education on recommendation of the executive officer and he shall proceed in the performance of his duties in accordance with the rulings of the State and Federal Boards under the provisions of the state and Federal laws for vocational education in Texas."

Under the above-quoted resolution of the board, the State Superintendent of Public Instruction would have the power to select the personnel of the Vocational Educational Division, subject to the approval of the State Board of Vocational Education.

You have orally requested that this department further advise the State Board of Vocational Education whether it may rescind in whole or in part its order in making the State Superintendent its executive officer with the power to appoint the persons employed in the Vocational Educational Department.

You are advised that the State Board may, at its pleasure, modify its order and divest the State Superintendent of the power to appoint granted to him under the resolution above quoted, and that the board may then assume and exercise the power to appoint the persons employed in the Vocational Educational Department. Until the order above quoted has been modified, the State Superintendent has the power to select the personnel of the division administering vocational education laws and his selections are subject to the approval of the State Board.

Respectfully submitted,

GAYNOR KENDALL,
Assistant Attorney General.

Op. No. 2914.

CONSTITUTIONAL LAW—APPROPRIATION TO PRIVATE PERSONS FOR PUBLIC PURPOSES—CONSTITUTION (Art. 3, Sec. 51)—CONSTITUTION (Art. 16, Sec. 6.)

1. Except where it is expressly authorized to do so, the legislature is without power under Section 51 of Article III of the Constitution to grant or appropriate public money to individuals, associations or corporations even when the money appropriated is to be used for or in aid of public purposes.

2. Fees imposed as license fees are public money within the meaning of Section 51 of Article III of the Constitution.

3. The fees collected as annual registration fees from pharmacists become public money upon their collection, and the legislature was without power to appropriate a portion of those fees to the Texas State Pharmaceutical Association, a private corporation.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, February 25, 1933.

Hon. R. L. Reader, Chairman, Committee on Public Health, House of Representatives, Austin, Texas.

DEAR SIR: This will acknowledge receipt of the following letter from your committee:

"Section 14, Pharmacy Law, Acts Regular Session of the Forty-first Legislature, 1929, reads in part as follows:

"Every registered pharmacist who desires to continue the practice of

pharmacy in this State shall annually, on or before the second day of January of each year, pay to the secretary of the Board of Pharmacy a renewal fee of three dollars (\$3.00). If any person fails or neglects to procure his renewal registration before March first of each year his name shall be erased from the register of licensed pharmacists, and such person in order to regain registration shall be required to pay one annual renewal fee in addition to the sum of all fees such person may be in arrears. Provided, also, that the board shall each year turn over to the State Pharmaceutical Association for the advancement of the science and art of pharmacy, out of the annual fees collected by it, the sum of two dollars (\$2.00) for each pharmacist actively engaged and one dollar (\$1.00) for each pharmacist not actively engaged in pharmacy in this State.'

"I wish you would give me your opinion as to the constitutionality of this section. Funds collected, as provided herein, are being used to pay the salary of the Secretary, Legislative Committee, publication of magazine, expenses of delegates to the National Association of Retail Druggists meeting and delegates attending the American Pharmaceutical Association and one scholarship loan each year, amounting to about two hundred dollars. In other words, the money is used for purposes such as those used by the State Medical Association or Bar Association or other professional organizations.

"I want to correct this error if in your opinion this section be unconstitutional. I will thank you very much if you will give me an early opinion on this, as I have a bill now pending in the Public Health Committee on this subject."

In view of the fact that the Texas State Pharmaceutical Association is a private corporation, organized, according to its charter, "for the promotion of Pharmaceutical Science and Art; the fostering and encouragement of all legitimate schools of pharmacy which have been or may be established in the State of Texas, and, if necessary, the creation of a College of Pharmacy, which shall be under the direct supervision of this Association," I interpret your letter as requesting the opinion of the Attorney General in reference to the validity of that portion of Section 14, supra, which provides that the Board of Pharmacy shall turn over to the Pharmaceutical Association "for the advancement of science and art of pharmacy" a stipulated portion of the annual registration fees collectible under the provisions of the act.

The request of Honorable Moore Lynn, State Auditor, for an opinion on the same question has been under consideration by this department for some time. Both inquiries will be treated and answered in this letter.

Section 51, Article 111 of the Constitution of Texas, reads in part as follows:

"The Legislature shall have no power to make any grant or authorize the making of any grant of public money to any individual, association of individuals, municipal or other corporations whatsoever, provided, however, the Legislature may grant aid to indigent or disabled Confederate soldiers or sailors, * * *, and provided further that the provisions of this section shall not be construed so as to prevent the grant of aid in cases of public calamity."

If it is to be said that the appropriations made to the Pharmaceutical Association is invalid as being a grant of public money in contravention of Section 51 of Article 111, supra, it is requisite that it first be decided that the money appropriated is "public

money," within the meaning of the constitutional prohibition. In answering the latter question, we deem it necessary to consider the nature of the power under which the fees are assessed and collected.

Chapter 107, Acts Regular Session, Forty-first Legislature, which you term the "Pharmacy Law," creates a State Board of Pharmacy, provides for the appointment, terms and tenure of office of its members, and provides for their compensation. It further provides for the examination of persons who desire to engage in the practice of pharmacy in this State, and for the licensing and registering of those persons who honorably meet the requirements set up by the board. Section 14 of the Act, a portion of which is copied above from your letter, requires registered pharmacists who desire to continue to pursue the occupation, to renew their registration with the board annually, and to pay a renewal fee of three dollars, if the person is in active practice, or two dollars if inactively engaged, in order to legally continue in the practice. It is made unlawful for any person to practice pharmacy in the State, without having complied with the provisions of the act; the board is charged with the duty of seeing that all laws which pertain to the practice of pharmacy are enforced, and it is provided that the license of any pharmacist may be cancelled by the board upon his conviction of having violated certain of the penal provisions of the laws.

Examination of the act readily discloses, therefore, that the primary purpose of the legislature in the enactment thereof was to regulate and control the practice of pharmacy—the compounding and selling of dangerous drugs. The annual registration fees imposed by the act are not so great in amount as to indicate that the primary purpose for which they were imposed was for the raising of revenue, other than to defray the expense incident to controlling the pursuit of the occupation regulated by the act. A charge imposed under such conditions is a license fee imposed under the sovereign's power of police and is not a charge imposed under the power of taxation. *DeGruy v. Louisiana State Board of Pharmacy*, 141 La. 896, 75 So. 835; *Ex Parte Gregory*, 20 Tex. App. 210, 54 Am. Rep. 516; *Brown vs. City of Galveston*, 97 Tex. 1; 75 S. W. 488; *Ex Parte Cramer*, 62 Tex. Cr. Rep. 11, 136 S. W. 61, 36 L. R. A. (N. S.) 78, Ann. Cas. 1913C, 588; 37 C. J. 169, Sec. 6.

The writer is not aware of any Texas decision deciding whether license fees assessed under the police power of the State and collected by the officers of the State are public moneys within the meaning of Section 51 of Article III, *supra*. A close analogy, however, is to be found in the instance of fines and penalties collectible under the penal laws, as they are imposed by the State in the exercise of its police power. It is settled law in Texas that moneys paid to the officers of the State in the discharge of a pecuniary fine or penalty are "public moneys" within the meaning of Section 51 of Article III of the Constitution. *Ex parte Smythe*, (Tex. Cr. App.) 120 S. W. 200. It is our opinion that the moneys collected

from pharmacists as annual registration fees are likewise "public moneys."

Having reached the conclusion that the money appropriated to the State Pharmaceutical Association "for the advancement of science and art of pharmacy," is public money, we are confronted with the question whether the appropriation thereof to the Pharmaceutical Association is a "grant" of public money to a private corporation in contravention of the constitutional provision above quoted.

In a few jurisdictions, it has been held that a constitutional prohibition inhibiting a "donation" or "gift" of public money to or in aid of any individual, association or corporation, is a restriction upon the power of the legislature with reference only to the purposes for which public funds may be used. Under this view, the legislature would be within its powers in using any agency within the limits of its discretion to achieve an end for which an expenditure of public funds may be made, and it is held that an appropriation to a private individual or private corporation is not a "gift" or "donation" within the meaning of prohibition, if the use be a public one. *Hager v. Kentucky Children's Home Society*, 119 Ky. 235, 83 S. W. 605, 26 Ky. Law Rep. 1133, 67 L. R. A. 815; *Bullock vs. Billheimer*, 175 Ind. 428, 94 N. E. 763.

The Kentucky Court of Appeals in the *Hager* case, *supra*, clearly summarizes the view taken by these authorities, in saying:

"The authorities clearly settle that the vital point in all such appropriations is whether the purpose is public; and that, if it is, it does not matter whether the agency through which it is dispensed is public or is not; that the appropriation is not made for the agency, but for the object which it serves; the test is in the end, not in the means. The limitation put upon the State government by the people is as to what things it may collect taxes from them for, to which it may apply their property through taxation; not upon the means by which or through which it will do it. It may well and wisely be left to the legislature to say how it will dispense the state's charities."

Seemingly, the Missouri Supreme Court is, in spirit, in accord with the authorities above cited. The view of that honorable court should receive our especial attention, in view of the fact that the Missouri Constitution contains a provision very similar to Section 51 of Article III of our own Constitution. The 46th section of Article IV of the Constitution of Missouri reads as follows:

"The general assembly shall have no power to make any grant of public money or thing of value to any individual, association of individuals, municipal or other corporation whatsoever; provided, that this shall not be so construed as to prevent the grant of aid in a case of public calamity."

The general assembly of the State of Missouri in 1893, made an appropriation "for the support of the indigent insane in the insane asylum of the City of St. Louis, who belong to the State outside of the City of St. Louis" in the sum of fifty thousand dollars. The insane asylum was owned and operated by the city, and the state auditor refused to draw his warrant in favor of the asylum, contending that the appropriation was unconstitutional. In *State ex rel.*

City of St. Louis v. Seibert, 123 Mo. 424, 24 S. W. 750, 27 S. W. 624, a divided court sustained the validity of the act, saying:

"If the appropriation complained of had been made for the support of the insane asylum of St. Louis, there could be no doubt of its unconstitutionality. * * *

"The appropriation is for the indigent insane of the state outside the City of St. Louis, and not for the institution. There is no prohibition here, unless the state has no power to dispense its public charity through the agency of a private institution. There is no constitutional inhibition against it doing so. * * *. There is no provision that all charity shall be dispensed through state institutions. * * *. But a private corporation or individual may be the recipient of the funds of taxation, provided that the use be a public one."

On the other hand, a number of jurisdictions have construed prohibitions against appropriations of public money to individuals, associations and corporations as prohibiting appropriations to any of the enumerated classes upon any use, public or private. *Speer v. School Directors of Blairsville*, 14 Wright, 150; *Wilkesbarre City Hospital vs. County of Luzerne*, 84 Pa. St. 55; *Washington Home of Chicago v. City of Chicago*, 157 Ill. 414, 29 L. R. A. 798; *Mich. Corn Improvement Ass'n vs. Auditor General*, 150 Mich., 69. 113 N. W. 582; *Detroit Museum of Art v. Engel*, 187 Mich. 432, 153 N. W. 700; *State ex rel Orr v. City of New Orleans*, 50 La. Ann. 880, 24 So. 666; *John v. Wadsworth*, 80 Wash. 352, 141 Pac. 892.

The 7th section of Article IX of the Constitution of Pennsylvania, 1874, declared that "The general assembly shall not authorize any county, city, borough, township or incorporated district . . . to obtain or appropriate money for or loan its credit to any corporation, association, institution or individual." In speaking of the above-quoted constitutional restriction, the Supreme Court of Pennsylvania, in *Speer v. School Directors*, supra, said:

"The purpose was to prevent the money of the people from passing into the control of private irresponsible associations or parties, and from being squandered in undertakings of doubtful propriety, or being liable to be lost through the want of integrity of those engaged in its disbursement. It intended to confine the municipal expenditures not only to public objects, but to public officers or agents under their direct responsibility to the municipality."

The position taken by the court in the *Speer* case, was reaffirmed in *Wilkesbarre City Hospital v. County of Luzerne*, supra.

In *Johns v. Wadsworth*, supra, the court had under consideration the constitutionality of an act authorizing counties of the state to grant money to agricultural fair associations to enable such associations to promote agricultural exhibitions, etc.

Article VIII, Section 7, of the Constitution of Washington reads:

"No county, city, town or other municipal corporation shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation."

The Supreme Court of Washington, holding the act invalid, said in the course of its opinion:

"The section of the Constitution last quoted in most express terms prohibits a county from giving any money, property, or credit to, or in aid of, any corporation, except for the necessary support of the poor and infirm. If the framers of the Constitution had intended only to prohibit counties from giving money or loaning credit for other than corporate or public purposes, they would doubtless have said so in direct words. That agricultural fairs serve a good purpose is not questioned, but the constitution makes no distinction between purposes, but directly and unequivocally prohibits all gifts of money, property, or credit to, or in aid of, any corporation, subject to the exception noted. * * *.

"Here the appropriation is to a private corporation organized for a worthy purpose, educational in its nature. There is no room, however, for construction. Unless plain, simple, direct words have lost their meaning, the Legislature was without power to authorize the gift."

An examination of the cases above cited discloses that there is a conflict of judicial opinion upon the question whether a constitutional provision prohibiting a "grant" or "donation" of public money to individuals, associations or corporations, prohibits appropriations to private persons or corporations where the money is appropriated for and is to be used for a purpose public in its nature. In determining whether the framers of the Constitution intended that Section 51 have the one meaning or the other, let us examine the language of that section in reference to other provisions of the Constitution.

If Section 51 of our Constitution prohibits appropriations or grants of public money to individuals, associations or corporations only where the appropriation is for private or individual purposes, it is superfluous, since Section 6 of Article XVI denies to the legislature the power to make an appropriation for private or individual purposes. Evidently, the framers of the document intended that the former section should have some meaning other than that expressed in unmistakable terms in Section 6, Article XVI.

Further, we think that another provision of the Constitution clearly shows what was meant by the exception from the powers of the legislature the power to "grant" public money to individuals, associations or corporations. Section 52, Article III of the Constitution of Texas, as amended in 1904, reads as follows

"The Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company, provided, however, that under legislative provision any county, any political subdivision of a county, any number of adjoining counties, or any political subdivision of the State, or any defined district now or hereafter to be described and defined within the State of Texas, and which may or may not include, towns, villages or municipal corporations, upon a vote of a two-thirds majority of the resident property taxpayers voting thereon who are qualified electors of such district or territory to be affected thereby, in addition to all other debts, may issue bonds or otherwise lend its credit in any amount not to exceed one-fourth of the assessed valuation of the real property of such district or territory, except that the total bonded indebtedness of any city or town

shall never exceed the limits imposed by other provisions of this Constitution, and levy and collect such taxes to pay the interest thereon and provide a sinking fund for the redemption thereof, as the Legislature may authorize, and in such manner as it may authorize the same, for the following purposes, to-wit:

(a) The improvement of rivers, creeks, and streams to prevent overflows, and to permit of navigation thereof or irrigation thereof, or in aid of such purposes.

(b) The construction and maintenance of pools, lakes, reservoirs, dams, canals and waterways for the purposes of irrigation, drainage or navigation, or in aid thereof.

(c) The construction, maintenance and operation of macadamized, graveled or paved roads and turnpikes, or in aid thereof."

We think that there is no doubt that the improvement of rivers, creeks and streams to prevent overflows, the construction and maintenance of reservoirs, etc., for the purpose of irrigation, drainage and navigation, and the construction of improved roads and turnpikes, are public purposes for which state governments and their local subdivisions, in absence of constitutional restriction, can expend public funds however raised. The scope of the exception proves the breadth of the rule. The constitution having prohibited the legislature from authorizing counties and other political subdivisions of the state from granting public money and from lending public credit to any individual, association or corporation, yet excepting certain *public* purposes for which the legislature may authorize counties, cities and political corporations to issue bonds or otherwise lend their credit, it follows that public purposes not enumerated in the exception are included within the rule prohibiting the granting of public money or credit to private associations or parties. The legislature would, therefore, be powerless to authorize political subdivisions of the State to grant public money or to lend public credit to private persons, natural or artificial, except where expressly authorized to do so by the Constitution itself, even in the achievement of a public purpose.

The framers of the Constitution have couched the exception to the power of the legislature to "grant" public money to private persons in the same language that they used in excepting from its powers the power to authorize political subdivisions of the state to grant public money or public credit to private persons. We know of no better rule to follow in construing constitutional provisions, than to assume that where a word or phrase is used more than once in the same document, it is intended that the word or phrase has a uniform meaning. The constitutional provision excepting from the powers of the legislature the power to authorize political subdivisions of the State to appropriate public money to private persons even to be used for or in aid of public purposes or objects, by prohibiting the authorization of cities, counties, etc., to "grant" public money to private persons except for certain enumerated public purposes, it follows that the constitutional provisions, denying to the legislature the power to grant public money to private persons, prohibits appropriations to those persons even though the money is to be expended by them for or in aid of a public purpose pro-

vided of course that the legislature may make such appropriations where it is specifically authorized to do so by the Constitution.

To paraphrase the language of the Supreme Court of Pennsylvania, we think it was the purpose of the people in incorporating Section 51 of Article III in the Constitution, to prevent the money of the people from passing into the control of private irresponsible associations or parties—to confine public expenditures not only to public objects, but to public officers or agents directly responsible to the sovereign, except in those instances in which the Constitution expressly authorized grants or appropriations to private persons or corporations. In other words, it is our opinion that the legislature is prohibited from turning public money over to individuals having no official connection with the State, even if the money is to be expended by them in aid of or for a public purpose.

We think that the case, *City of Aransas Pass vs. Keeling*, 112 Tex. 339, 247 S. W. 818, in no way conflicts with the conclusions reached in this opinion. In that case it was held that Section 51 of Article III did not prohibit the legislature from using cities or counties as agents for the disbursements of public money in the performance of duties resting on the State at large. When the officers of a county or a city act in the performance of a governmental function, they act not for the city or county, but for the State itself—they are in such instances public officers acting as the agents of the sovereign. *City of Galveston vs. Posnainsky*, 62 Tex. 118, 50 Am. Rep. 517.

Further, we think that the Keeling case is distinguishable from the question under consideration in that it was held in that case that the legislature was expressly authorized under Section 8 of Article XI of the Constitution to donate public money to the counties and cities of the Gulf Coast in the construction of sea walls, breakwaters, etc.

It is our opinion, therefore, and you are advised, that the provision in Section 14, Chapter 107, supra, which requires the board to turn over to the State Pharmaceutical Association certain portions of the annual fees collected, is invalid and void under Section 51 of Article III of the Constitution of Texas.

Very truly yours,

GAYNOR KENDALL,
Assistant Attorney General.

Op. No. 2840

GAS UTILITIES—STATUTORY CONSTRUCTION

1. The mere producer of natural gas who sells it at the well on the open market and who is not engaged in the transportation or distribution thereof, is not a public utility or gas utility as defined by Article 6050 of the Revised Civil Statutes of 1925 and, therefore, not subject to the tax imposed by Article 6060 of the Revised Civil Statutes of 1925.

2. Authorities: *State of Texas vs. San Patricio Canning Company, et al*, 17 S. W. (2nd) 160-1-2-3; *McCallum, Secretary of State vs. Associated Retail Credit Men of Austin*, 26 S. W. (2nd) 715-16-17.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, April 2, 1931.

*Honorable C. V. Terrell, Chairman, Railroad Commission of Texas,
Austin, Texas.*

DEAR SIR: This will acknowledge receipt of a letter of recent date from your Mr. Laten Stanberry, Acting Director, Gas Utilities Division, Railroad Commission of Texas, which reads as follows:

"Does the producer of natural gas who sells his gas on the open market at the well and who is engaged in neither the transportation nor distribution of same come within the meaning of a public utility as defined by Article 6050, Revised Civil Statutes of Texas, 1925, and is he subject to the tax levied on gas utilities under Article 6060, Revised Civil Statutes, 1925?"

Replying, beg leave to state that we have carefully analyzed the articles inquired about in Mr. Stanberry's letter, and all court decisions we could find in connection therewith, and are compelled to answer the question in the negative.

In writing this opinion, however, we are not unmindful of some opinions emanating from this department under former administrations tending to hold to the contrary.

In most of the opinions we have found discussing this subject, however, it has been practically conceded that if the class of persons inquired about are to be classed as public or gas utilities, it must be by virtue of subdivision 3 of said article. Said Article 6050 reads, in part, as follows:

"The term 'gas utility' and 'public utility' or 'utility', as used in this subdivision, means and includes persons, companies and private corporations, their lessees, trustees, and receivers, owning, managing, operating, leasing or controlling within this State any wells, pipe lines, plant, property, equipment, facility, franchise, license, or permit for either one or more of the following kinds of business:

"1. (Not necessary to quote herein).

"2. (Not necessary to quote herein).

"3. Producing or purchasing natural gas and transporting or causing the same to be transported by pipe lines to or near the limits of any municipality in which said gas is received and distributed or sold to the public by another public utility or by said municipality, in all cases where such business is in fact the only or practically exclusive agency of supply of natural gas to such utility or municipality, is hereby declared to be virtual monopoly and a business and calling affected with a public interest, and the said business and property employed therein within this State shall be subject to the provisions of this law and to the jurisdiction and regulation of the Commission as a gas utility.

"Every such gas utility is hereby declared to be affected with a public interest and subject to the jurisdiction, control and regulation of the Commission as provided herein."

We especially call your attention to the conjunction "*and*" on the first line of said section or subdivision 3, just succeeding the word "gas" and preceding the word "transporting." In our opinion this simple "*and*" has a very significant meaning. It seems clear to us that it was evidently the intention of the Legislature that a mere producer of natural gas should not come within the statutory meaning of a public or gas utility unless he goes at least one step

further and transports the gas or causes the same to be transported by pipe line, etc. If the Legislature had used the conjunction "or" instead of "and", then it might be susceptible of a different construction. Certainly a man who sells his gas at his well on the open market would not be transporting or causing the same to be transported even though his purchaser does, in fact, transport or cause the gas to be transported, because when the producer sells his gas under these conditions, that is, at his well and on the open market, it naturally would be immaterial to him, at least from a financial standpoint, whether the purchaser turns it into the air, burns it in flambeau lights, transports it or makes any other disposition of it he sees fit. We do not see how he could be legally charged with the knowledge of what disposition his purchaser might desire to make of the gas when sold under these conditions.

If the above is not a proper construction to be placed upon said subdivision 3 or article, then it must be admitted that the language and phraseology used therein are very vague and indefinite and that no other reasonable construction could be placed thereon except by implication or by transposing and rewording the statutes, neither of which is permissible and especially is this true in construing taxing statutes.

It is a well recognized principle of law that, in the interpretation of statutes imposing taxes, provisions will not be extended by implication beyond the plain import of the language used, nor will their operation be enlarged to apply to subjects not specifically included therein and, in case of doubt, taxing statutes are construed most strongly against the government and in favor of the citizen. See *State of Texas vs. San Patricio Canning Company, et al*, 17 S. W. (2nd) 160-1-2-3, also, *McCallum, Secretary of State vs. Associated Retail Credit Men of Austin*, 26 S. W. 715-16-17.

The last case above cited also announces the doctrine that long acquiescence by the Legislature in construction of tax statutes by State departments and re-enacting statutes without change indicates that the Legislature intended that construction. The application of this principle is both permissible and persuasive in construing the statute under consideration since it, Article 6050, defining and classifying gas utilities or public utilities, and Article 6060, of the Revised Civil Statutes of 1925, imposing a tax of one-fourth of one per cent on the gross income of such utilities, were passed approximately eleven years ago and reenacted by the Legislature of Texas in 1925 without change, notwithstanding the department, as we understand, in view of the doubt surrounding the construction of said statute, has never made any real effort to so classify and collect the tax from the class of persons inquired about in your letter.

It is, therefore, the opinion of this department that the mere producer of natural gas who sells it at the well on the open market and who is not engaged in the transportation or distribution thereof, is not a public utility or gas utility as defined by Article 6050,

Revised Civil Statutes, 1925, and, therefore, not subject to the tax imposed by Article 6060 of the Revised Civil Statutes of 1925.

Very truly yours,

FRED UPCHURCH,
Assistant Attorney General.